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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

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WILLIAM JOSEPH KIRK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

◆

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTION PRESENTED

William Joseph Kirk challenged his conviction for possession of a machinegun under 18 U.S.C. § 922(o), contending that by criminalizing mere possession of a machinegun, Congress had exceeded its authority under the Commerce Clause.

The lower court held that the scope of the Commerce Clause was not exceeded. The question presented here is:

Did Congress exceed its authority granted by the Commerce Clause by enacting 18 U.S.C. § 922(o) which prohibits mere possession of a machinegun?

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PETITION FOR WRIT OF CERTIORARI

William Joseph Kirk ("Petitioner") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 3, 1997, in order to resolve the conflict between the lower court's decision and U.S. Const., Art. I, § 8, as interpreted by the Supreme Court in *United States v. Lopez,* 115 S.Ct. 1624 (1995).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published at *United States v. Kirk,* 105 F.3d 997 (5th Cir. 1997) *en banc*. It is reprinted in Appendix A hereto at page A-1. This opinion was decided upon review *en banc* of the Court's panel decision which was decided November 5, 1995, and published at *United States v. Kirk,* 70 F.3d 791 (5th Cir. 1995), *rehearing en banc granted,* 78 F.3d 160 (1996). The panel opinion is reprinted in Appendix B. at page B-1. The Court's order granting rehearing *en banc* was issued on March 5, 1996, and is published at *United States v. Kirk,* 78 F.3d 160 (5th Cir. 1996). That order is reproduced here in Appendix C at page C-1.

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JURISDICTION

On April 7, 1994, the United States District Court for the Western District of Texas, issued an order denying

Petitioner's Motion to Dismiss the Indictment. Defendant appealed the order after his conviction on a plea of guilty and sentence of twelve months and one day having specifically reserved the right to do so pursuant to Rule 11(a)(2) F.R.Cr.P. Timely appeal was taken from the trial court's June 29, 1994 judgment to the United States Court of Appeals for the Fifth Circuit. Jurisdiction for the appeal to that court is provided for in 28 U.S.C. § 1291. A panel of that court affirmed the conviction in an opinion filed November 7, 1995. Rehearing *en banc* was timely sought and granted by order of the court dated March 5, 1996. After rehearing *en banc*, the conviction was affirmed by virtue of an evenly divided court in an opinion filed on February 3, 1997. Pursuant to Supreme Court Rule 13.1 this petition has been filed within 90 days of the final judgment of the Court of Appeals.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

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STATUTES INVOLVED IN THIS CASE

Title 18 U.S.C. § 922(o) provides:

> (o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to –
>
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a

> department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

◆

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Western District of Texas for two counts of possession of a machinegun and two counts of transfer of a machinegun in violation of 18 U.S.C. § 922(o). He moved to dismiss all counts of the indictment on the basis that regulating the simple possession and intrastate transfer of a machinegun exceeded Congress' authority under the Commerce Clause, U.S. Const. Art. I, § 8. The trial court denied the motion and Petitioner entered a plea of guilty to one count of possession of a machinegun under § 922(o), reserving his right to appeal the ruling on the motion to dismiss under Rule 11(a)(2) F.R.Cr.P. He timely appealed to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit, in a panel opinion, affirmed the conviction by a two to one vote, holding that Congress' regulation of possession of machineguns was proper under the Commerce Clause. Suggestion for Rehearing En Banc was timely filed and granted by the court. Upon rehearing *en banc*, the Fifth Circuit, with sixteen judges participating, equally divided on the issue. Eight judges expressed the opinion that possession of a machinegun has a substantial effect on interstate commerce and is therefore within the scope of the Commerce Clause. Eight judges joined an opinion urging that mere possession of a machinegun lacks any significant connection with interstate commerce and is therefore beyond the power of Congress to regulate. By virtue of the equally divided court, Petitioner's conviction was affirmed.

◆

REASONS FOR GRANTING THE WRIT

The Holding Of The Fifth Circuit Court Of Appeals Expands The Scope Of The Commerce Clause Beyond The Limits Identified In This Court's Decision In *United States v. Lopez,* To The Extent That It Authorizes A General Federal Police Power.

In *United States v. Lopez,* 115 S.Ct. 1624 (1995), this Court held 18 U.S.C. § 922(q) (The Gun Free School Zones Act) unconstitutional. The majority found that the statute prohibiting possession of a firearm in a "school zone" neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce, and thus, exceeded "the authority of Congress '[t]o regulate Commerce . . . among the several States' . . . U.S. Const., Art. I, § 8." *Id.* at 1626. At issue in this case is 18 U.S.C. § 922(o) insofar as it prohibits the mere possession of machineguns. On its face the statute appears to be identical to 18 U.S.C. § 922(q) in that there is no requirement that the possession be connected in any way to interstate commerce nor is mere possession of the prohibited weapon overtly a commercial activity.

In the course of its analysis in *United States v. Lopez,* the Supreme Court reviewed the historical development of its jurisprudence concerning the Commerce Clause and identified three categories of permissible federal regulation. First, Congress may regulate the use of the channels of interstate commerce. Second, federal power properly extends to the regulation and protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce. This is true even where the threat comes from intrastate activities. Finally, Congress may regulate those activities having a substantial relation to interstate commerce. *Id.* 115 S.Ct. at 1629. In ruling on the constitutionality of 18 U.S.C. § 922(q), this Court quickly concluded that the statute was neither a regulation of the use of the channels of interstate commerce nor of the instumentalities or persons or things in interstate commerce. Its decision rested on the determination of whether the Gun Free School Zone Act had a substantial effect on interstate commerce.

Since the Supreme Court's decision in *Lopez,* several Circuit Courts of Appeals have ruled on the constitutionality of 18 U.S.C. § 922(o) as it pertains to possession of machineguns. All have held the statute to be within the scope of Congress' authority under the Commerce Clause, but have differed on their reasoning. Some decisions have upheld the statute as a regulation of the use of the channels of commerce. *United States v. Rambo,* 74 F.3d 948 (9th Cir. 1996). Others have decided that the statute is supportable as a regulation of things in commerce. *United States v. Wilks,* 58 F.3d 1518 (10th Cir. 1995). The Sixth Circuit determined that the statute is supportable under all three *Lopez* categories. *United States v. Beuckelaere,* 91

F.3d 781 (6th Cir. 1996). The Third Circuit applied the rationale of the "substantial affect" category, found the statute constitutional and then declined to consider the other categories. *United States v. Rybar,* 103 F.3d 273 (3rd Cir. 1996). The Seventh Circuit decided that if 18 U.S.C. § 922(o) is a valid exercise of the Commerce Clause power it must be because the activity regulated has a substantial effect on interstate commerce. *United States v. Kenney,* 91 F.3d 884 (7th Cir. 1996). At least twelve members of the *en banc* Fifth Circuit considered the constitutionality of § 922(o) in terms of the "substantial affect" *Lopez* category.[1] *United States v. Kirk,* 105 F.3d 997 (1995), at 998 (Higginbotham, J., concurring) and at 1008 (Jones, J., dissenting).

The statute is properly analyzed under the third *Lopez* category as it is neither a regulation of the channels of commerce or of things in commerce. The rationale of the Seventh Circuit in *Kenney* and of twelve members of the *en banc* Fifth Circuit in this case are correct in that regard.

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[1] Eight members of the *en banc* Fifth Circuit joined in a Per Curiam opinion by Parker, J. which does not clearly set forth in which *Lopez* category the statute properly falls. However the opinion concludes that the "manufacture, transfer and possession of machineguns substantially affect commerce and § 922(o) therefore is constitutional." *United States v. Kirk,* 105 F.3d at 998. Four members of the Court who joined with the Per Curiam opinion, joined in a separate concurring opinion by Higginbotham, J. upholding the constitutionality of the statute clearly as a regulation of an activity having a substantial affect on interstate commerce and engaging in the analysis set forth in *Lopez* as applicable to that category. *Id.* at 998, 999-1005. The remaining eight judges hearing the case specifically rejected the "things in commerce" or "channels of commerce" justifications and focused on the "substantial affect" category. That dissenting opinion, authored by Jones, J. would have found the statute invalid. *Id.* at 1005-1017.

The first category discussed in *Lopez,* the "channels of interstate commerce" category, appears to be a narrow one. The citations given in *Lopez* as examples of this category are limited to direct regulation of the channels of commerce and each regulation at issue contains a jurisdictional nexus element.[2] In *Kenney,* the court noted the apparently limited application of this category. *Kenney,* 91 F.3d at 889. Both the *Kenney* Court and the eight judges of the *en banc* Fifth Circuit in the dissenting opinion in this case by Judge Jones pointed out that not all machineguns which may be possessed in violation of § 922(o) would necessarily have been preceded by an illegal transfer or by travel in interstate commerce. Both opinions cite instances where semiautomatic weapons are converted to machineguns using raw materials or where weapons begin to fire as automatic weapons due to wear and tear. *Id.,* at 889; *Kirk,* 105 F.3d at 1011 (Jones, J., dissenting).[3] Because § 922(o) regulates all instances of possession of machineguns, it regulates much more than merely the channels of interstate commerce, and reaches intrastate possession of machineguns as well as those which have illegally moved or been transferred in interstate commerce. *Kenney*, 91 F.3d at 889; *Kirk*, 105 F.3d at 1011 (Jones, J., dissenting).

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[2] In *Lopez,* 115 S.Ct. at 1629, the Court cited *United States v. Darby,* 312 U.S. 100, 114, 61 S.Ct. 451, 457 (1941) (regulation of working conditions in the production of goods for interstate commerce) and *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 256, 85 S.Ct. 348, 357 (1964). Each of the statutes involved in this case required proof of impact on interstate commerce.

[3] See, *United States v. Jones,* 976 F.2d 176, 178 (4th Cir. 1992), *cert. denied,* 508 U.S. 914, 113 S.Ct. 2351 (1993) (describing home conversion of shotguns) and *United States v. Anderson,* 885 F.2d 1248, 1250-51 (5th Cir.) (*en banc*) (an automatic weapon may evolve from an ordinary one through normal wear and tear).

As Judge Jones' dissenting opinion stated in the *en banc* review of the instant case, § 922(o) does not more clearly express a nexus to channels of commerce than did its "virtual clone", § 922(q). *Lopez* summarily rejected the argument that banning firearms in school zones regulates the channels of commerce. There is simply nothing to distinguish the statute at issue here from the one under scrutiny in *Lopez*. "Decisions like *Rambo* and the panel opinion [in this case], in holding otherwise, have distorted the channels of commerce rationale . . . " *Id.* at 1011 (Jones, J., dissenting).

Nor is § 922(o) properly categorized as a regulation of "things in commerce or instumentalities of interstate commerce." Again, the examples of this category set forth in *Lopez* indicate a narrow scope relating to things actually in commerce and instrumentalities clearly involved in interstate commerce.[4] The connection with interstate commerce "is explicit and obvious in each case." *Kenney,* 91 F.3d at 889.

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[4] Cited in *Lopez*, as illustrative of this category are *Shreveport Rate Cases*, 234 U.S. 342, 34 S.Ct. 833 (1914) (rate regulation of railroad engaged in interstate commerce) and *Southern Ry. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2 (1911) (upholding amendments to the Safety Appliance Act as it applies to vehicles used in intrastate commerce). *Lopez*, 115 S.Ct. at 1629.

As with the first category, the regulation of § 922(o) extends to activities not directly related to interstate commerce. The regulation is thus "much broader than the category." *Id.,* at 889; *Kirk,* 105 F.3d at 1012 (Jones, J., dissenting). The offense is not dependent on or related to the movement of the weapon in interstate commerce. Further, not all commerce is interstate commerce. "[C]ommerce 'which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other States' is not commerce within the meaning of the Commerce Clause. *Gibbons v. Ogden,* 9 Wheat. 1, 22 U.S. 1, 194 (1824)." *Kirk,* 105 F.3d at 1012, (Jones, J., dissenting). To extend the "things in commerce" rationale to include anything of a character which ordinarily travels in commerce, as is the reasoning of *Wilks,* 58 F.3d at 1521, makes the Commerce Clause limitless, contrary to its purpose. *Kirk,* 105 F.3d at 1012, (Jones, J., dissenting). Virtually anything may be regulated by Congress anywhere at any time.

Simply stated, the third category of permissible regulation identified in *Lopez* is that governing "economic activity [which] substantially affects interstate commerce." *Lopez,* 115 S.Ct. at 1630. A subset of this category is a law which "is an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.,* at 1631. An example of this type of regulation survived challenge in *Wickard v. Filburn,* 317 U.S. 111, 63

S.Ct. 82 (1942). There a farmer was penalized for harvesting more wheat than his allotment allowed although the wheat was not to be sold. The Court upheld this penalty because the home production and consumption of wheat would, in the aggregate, affect the supply and price of wheat in the open market. Regulation of supply and price was the goal of the overall regulatory scheme.

To state the obvious, machineguns may be used in such a way as to substantially affect interstate commerce. Although Congress has not arrived at this conclusion through the process of hearings and debate, there is little doubt such a process would yield that conclusion. In the concurring opinion by Judge Higginbotham in the review *en banc* in the instant case, a great deal of information is collected from the popular press, scholarly studies and judicial opinions showing that automatic weapons can and do affect interstate commerce in the form of facilitating the illegal drug trade. *Kirk,* 105 F.3d at 1000-1005. (Higginbotham, J., concurring). Certainly, Congress could have rationally concluded "that the link between the violence caused by machineguns and the consequent negative commercial effects was substantial." *Beuckelaere,* 91 F.3d at 785.

However the question determinant of the constitutionality of § 922(o) is whether intrastate possession of a machinegun is an economic activity which substantially affects interstate commerce. The government in the instant case contends that § 922(o) is part of a comprehensive approach to the regulation of machineguns and that a single intrastate possession or transfer of a machinegun is significant because of the cumulative effect on the supply-and demand for machineguns. The *Kenney* decision analogized the banning of possession of a machinegun with the regulation of homegrown wheat at issue in *Wickard v. Filburn*. The opinion reasons that there is a rational basis to regulate the local conduct of machinegun possession to effectuate the overall purpose of § 922(o) which is to freeze the number of machineguns at 1986 levels. *Kenney*, 91 F.3d at 890. Judge Jones, in her dissenting opinion in the *en banc* review in the instant case, properly identifies the first and most critical element of *Lopez's* substantial effects "test" as that of characterization of the activity as economic in nature. She points out that neither the government nor the Court in *Kenney*, characterized § 922(o) as a regulation of economic activity. *Kirk*, 105 F.3d at 1014 (Jones, J., dissenting). Judge Jones goes on to conclude that mere intrastate possession of a machinegun is not an economic activity and § 922(o) " 'is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms.' *Lopez*, 115 S.Ct. at 1630-31." *Kirk*, 105 F.3d at 1014 (Jones, J., dissenting).

Petitioner urges that Judge Jones' characterization of § 922(o) insofar as it prohibits the intrastate possession of machineguns is the correct one. The distinction between the statute in question here and the regulation involved in *Wickard v. Filburn*, is that the growing of wheat for home consumption is an economic activity in the traditional sense. Filburn's consumption of home grown wheat substituted for the controlled wheat hindered the government's program to control and support prices in the wheat market. Section 922(o) intends to do away with the commercial market for machineguns manufactured after 1986. "Even if this goal constitutes a legitimate regulation of interstate commerce, it does not follow that criminalizing purely private, intrastate possession is necessary to eliminate the market." *Kirk,* 105 F.3d at 1014, (Jones, J., dissenting). By prohibiting transfer of machineguns, § 922(o) "aims directly and completely" at commercial activity in machineguns. Private possession of a machinegun does not involve a market activity.

If the Commerce Clause reached simple non-commercial possession of a thing, then possession of a firearm in a school zone would be within its scope. Under the rationale of *Kenney* and the concurring opinion by Judge Higginbotham in the instant case, possession of firearms could be prohibited nationwide if they were determined to be used in a manner detrimental to commerce but not in a small area such as a school zone. The critical factor is the nature of the activity regulated, not the geographical scope of the regulation.

The effect of the lower court ruling in this case is to extend the Commerce Clause power to allow Congress to criminalize possession of a firearm anywhere at any time. Under this rationale, Congress could have made Defendant Lopez's possession of his pistol in a school zone unlawful by making the same simple, non-economic possession, illegal everywhere. Congress would simply have to determine, or the Court determine that Congress could rationally have determined, that guns present a danger to commerce.

Criminalizing simple possession of any firearm without any nexus to interstate commerce moves federal regulation into an area previously occupied by the states. As Judge Jones set out in her dissenting opinion below, the general federal regulatory scheme as it existed prior to the enactment of § 922(o) and regulations passed concurrently with § 922(o) included either an expressed interstate commerce nexus or were based on the taxing authority of Congress. *Kirk,* 105 F.3d at 1011 (Jones, J., dissenting). Although, there were federal laws relating to the possession of machineguns prior to the enactment of § 922(o), these laws did not outright prohibit possession. They were based on the taxing authority of Congress and permitted possession of machineguns upon payment of a tax. See, 26 U.S.C. § 5861(d). The State of Texas has long prohibited the simple possession of machineguns. Texas Penal Code § 46.05.

Like § 922(q), § 922(o) intrudes upon the traditional police powers of the states and fails to afford a logical demarcation between the national and local interest. The statute thus runs afoul of *Lopez's* third mandate for a substantial effects regulation of intrastate activity. *United States v. Lopez,* 115 S.Ct. at 1631 n.3. Section 922(o) would punish for the mere possession of a machinegun acquired after 1986 with "no requirement that his possession of the [machinegun] have any concrete tie to interstate commerce." *Id.,* at 1634. A similar result was avoided in *United States v. Bass,* 404 U.S. 336, 349-50, 92 S.Ct. 515, 423-24 (1971).

As Judge Jones warns in her dissent for the *en banc* Fifth Circuit:

> To uphold § 922(o), a purely criminal law, with no nexus to interstate commerce, whose enforcement intrudes upon traditional police powers of

the states, would convert the commerce power into a reserved "general federal police power." Id. at 115 S.Ct. at 1632-33; see also id. at 115 S.Ct. at 1638 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."). The rationale that Congress can, on a blank slate, criminalize possession under the interstate Commerce Clause in order to regulate "the demand side of the market" can be applied to the possession of anything. Following *Lopez,* § 922(o) cannot be upheld as a regulation which substantially affects interstate commerce.

To prevent this expansion of federal power under the Commerce Clause beyond that which was envisioned by the framers and to an extent that renders our federal system a fiction, Certiorari is appropriate.

◆

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

William Joseph KIRK, Defendant-Appellant.

No. 94-50472.

United States Court of Appeals,
Fifth Circuit.

Feb. 3, 1997.

Richard L. Durbin, Jr., Asst. U.S. Attorney, Mark Randolph Stelmach, Assistant U.S. Attorney, Office of the United States Attorney, San Antonio, TX, for plaintiff-appellee.

Edwin Gerald Morris, Morris & Florey, Austin, TX, for defendant-appellant.

Keith S. Hampton, Cynthia Lanning Hampton, Austin, TX, for Texas Criminal Defense Lawyers Association, amicus curiae.

Appeal from the United States District Court for the Western District of Texas; Sam Sparks, Judge.

Before POLITZ, Chief Judge, and KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES,* STEWART, PARKER and DENNIS, Circuit Judges.

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*Judge Benavides was recused from consideration of this case.

PER CURIAM:

By virtue of an equally divided en banc court, the judgment of the district court is AFFIRMED.

ROBERT M. PARKER, Circuit Judge, joined by POLITZ, Chief Judge, and KING, HIGGINBOTHAM, DAVIS, WIENER, STEWART and DENNIS, Circuit Judges, would affirm for the following reasons:

In my view, there was a rational basis for Congress to conclude that post-1986 incidents of manufacture, transfer, and possession of machineguns fall within its power to regulate interstate commerce. Every circuit that has examined 18 U.S.C. § 922(o) – both before and after *United States v. Lopez,* ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) – has determined that § 922(o) does not exceed the authority granted to Congress by the Commerce Clause.[1]

A careful reading of *Lopez* compels this conclusion. In *Lopez,* the Supreme Court held that Congress exceeded its Commerce Clause power by enacting § 922(q) which criminalizes possession of a firearm within 1000 feet of the grounds of a school, see § 921(a)(25), a small geographic area finitely circumscribed and related to education, a uniquely local concern. In contrast, the extensive history of federal firearm regulation and the national scope of § 922(o) distinguishes it from § 922(q). It is important to the understanding of *Lopez* that the Supreme Court intended to establish an outer limit to congressional authority, not to retreat from well-established Commerce Clause precedent. *United States v. Kenney,* 91 F.3d 884, 887 (7th Cir.1996). As Chief Justice Rehnquist noted, "[S]ome of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further." *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1634.

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[1] *See United States v. Rybar,* 103 F.3d 273 (3d Cir.1996); *United States v. Beuckelaere,* 91 F.3d 781 (6th Cir.1996); *United States v. Kenney,* 91 F.3d 884 (7th Cir.1996); *United States v. Rambo,* 74 F.3d 948 (9th Cir.), *cert. denied,* ___ U.S. ___, 117 S.Ct. 72, 136 L.Ed.2d 32 (1996); *United States v. Wilks,* 58 F.3d 1518 (10th Cir.1995); *United States v. Hale,* 978 F.2d 1016 (8th Cir.1992), *cert. denied,* 507 U.S. 997, 113 S.Ct. 1614, 123 L.Ed.2d 174 (1993).

Simply stated, I believe that we should join the other circuits in holding that Congress had a rational basis for concluding that the manufacture, transfer and possession of machineguns substantially affect commerce and § 922(o) therefore is constitutional.

PATRICK E. HIGGINBOTHAM, Circuit Judge, joined by POLITZ, Chief Judge, and DAVIS and WIENER, Circuit Judges, would affirm for the following reasons:

We are persuaded that a legislative judgment that possession of machine guns acquired after 1986 has a substantial effect on interstate commerce, particularly by facilitating the trade in illegal drugs, is supported by our judicial experience and facts about machine guns and interstate criminal activity common to public discourse. Congress did not exceed its power under the Commerce Clause, and we today correctly affirm this conviction.

I.

This case ultimately turns on the role of congressional findings in judicial review of congressional exercises of its commerce power. Our opinion in *United States v. Lopez*, 2 F.3d 1342 (5th Cir.1993), *aff'd*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), stressed the absence of congressional findings of the relationship between Congress's regulation of guns near schools and its commerce power. We required that Congress justify its authority by findings. The Supreme Court affirmed our holding that Congress lacked authority to regulate possession of a gun in proximity to a school, but it did not adopt our rationale. Rather, the Court shied away from so direct an imposition of procedure upon the Congress. Nonetheless, the court did give weight to the absence of congressionally identified ties between the regulation and the commerce power. ___ U.S. at ___-___, 115 S.Ct. at 1631-32.

Lopez, then, adhered to a rational basis standard of review. This deferential standard does not insist that Congress actually make factual findings. To the contrary, its tolerance of hypothetical, judicially supposed purposes and means gives the rational basis standard its deferential character. Courts can assume a more activist role in judicial review by refusing to look to a basis for legislation not identified by Congress. This elevates the standard of review, according significantly less deference to Congress. Giving weight to the absence of congressional findings lies in the middle ground between an intrusive absolute insistence upon legislative findings and traditional rational basis inquiry. Congressional findings are not merely playthings of formalism. They help define the respective roles of the courts and the Congress and the federal and the state governments. So the role of findings demands our attention. But their absence does not end our inquiry. Here Congress made no findings. We give weight to the absence of findings, but we do not find their absence controlling. Under *Lopez*, we must continue to apply the rational basis test, which asks courts not to set aside congressional acts as exceeding the Commerce Clause power if the Congress could have found that the relevant intrastate activity has a substantial effect on interstate commerce. This deference respects differences between the fact-finding of courts and legislative findings, differences of a constitutional order. Legislative "findings," relative to judicial findings, are untidy in their blending of empirical assessment and policy judgments. The difference reflects the fundamentally different roles of the judiciary and the Congress. Congress must respond actively to problems faced by political communities; its judgment is accented by its look to the future and its effort to offer solutions to social ills. The judicial decision looks backward, responding to the limits of a case or controversy. We must not forget these differences in inquiring what the legislature rationally could have found. Losing sight of these differences risks a blurring of the respective roles of Congress and the courts, a difference the rational basis test is intended to respect. On the one hand, courts have a constitutional duty to scrutinize congressional actions to ensure that Congress stays within its constitutionally enumerated powers; "if *Lopez* means anything, it is that Congress's power under the Commerce Clause must have some limits." *United States v. Rybar,* 103 F.3d 273, 291 (3d Cir.1996) (Alito, J., dissenting). On the other hand, we must discipline our scrutiny to ensure that we are about the business of judicial review and not the business of social policy. Stated another way, respecting the policy-making role of majoritarian legislative bodies is not an empty recitation.

This familiar problem for rational basis review is especially awkward when the issue is whether an intrastate activity has a substantial effect on interstate commerce. Unless the Court follows Justice Thomas away from an effects test, *see Lopez*, ___ U.S. at ___-___, 115 S.Ct. at 1642-51 (Thomas, J., concurring), we cannot escape this difficulty. Justice Breyer's elaborate study of education, guns, and commerce will continue to be commonplace, despite the reality that judicial searches for data that might have supported a legislative finding raise the troubling prospect of the courts doing work the Congress ought to have done. *See id.* at ___-___, 115 S.Ct. at 1659-62 (Breyer, J., dissenting). And as Justice Souter has pointed out, the doctrine of clear statement offers no escape. *See id.* at ___, 115 S.Ct. at 1655 (Souter, J., dissenting). What the Supreme Court will do with the meaning of "substantial effect" remains to be seen. These plastic words may lessen deference to Congress by judicial demands for empirical evidence as well as normative valuations of state and federal "interests." Regardless of that future, according weight to the absence of legislative findings in close cases fairly accommodates these competing interests. Cases are at least close when courts feel the need to conduct elaborate empirical studies to determine whether the facts support exercise of the federal commerce power. If the facts were not within our easy reach, this would be a close case indeed, and the absence of findings would then tilt the outcome. This simply states a limit upon the role of the courts in their inquiries into whether there is a rational basis for a legislative judgment.

II.

In executing the rational basis test, we turn to facts bearing on the relationship between possession of machine guns and interstate commerce. The prosecution has not aided our factual inquiry on this score. But the concern over machine guns was hardly exotic. To the contrary, concern over both the unique firepower of automatic weapons and the recent increase in their number was the subject of public discussion, as a simple repair to the popular press makes plain. That exercise also sheds light on the type of data and expert opinion available to the Congress. A 1985 article in a national weekly magazine alerted Americans to the dangerous proliferation of machine guns and reported that "[t]he MAC-10 has become the side arm of choice for 'cocaine cowboys' and other drug smugglers." *Machine Gun U.S.A.*, NEWSWEEK, October 14, 1985, at 46. According to the article, American gun dealers imported an average of 55,000 machine guns during the early 1980s. In 1988, two years after the passage of § 922(o), the International Association of Chiefs of Police estimated that criminals possessed between 650,000 and two million automatic and semiautomatic weapons. *The Arms Race in Your Own Back Yard*, U.S. NEWS & WORLD REPORT, April 4, 1988, at 24. Presumably, the great percentage of these weapons were semiautomatic weapons and not machine guns. In 1987, the DEA "seized an average of one machine gun a day," which led the press to report that "most of this ferocious firepower is deployed in connection with narcotics trafficking." *Id*. This sort of information, easily accessible to Congress, would support a legislative judgment that the possession of machine guns interferes with federal drug enforcement; that regulating the simple possession of machine guns acquired after 1986 is necessary to stop the rapid growth of the pool of supply. Indeed, there is reason to think that Congress had these sorts of figures in mind when it enacted § 922(o). *See* 1986 U.S.S.C.A.N. 1330 (noting that an alternative bill "prohibited the transfer and possession of machine guns, used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the proceeds of crime").

The efficacy of § 922(o) also suggests that a legislative judgment of a strong tie between machine guns and federal crimes would have been valid. In 1983, ATF seized 871 machine guns and conversion kits; by 1985, that number had ballooned to 3,263. NEWSWEEK, October 14, 1985, at 46. After passage of § 922(o), however, this figure dropped dramatically. There were only 834 ATF machine gun seizures in fiscal year 1987, as opposed to 2,854 seizures in fiscal year 1986, a decrease of 71 percent. *Semiautomatic Assault Weapons Act of 1989: Hearings before the Subcommittee on Crime of the Committee on the Judiciary*, 101st Cong., 1st Sess. 354 (1989) (Appendix 9: "The 1986 Machine Gun Law Works"); Tony Freemantle, *Police Groups Warm to Bill on Gun Control*, HOUSTON CHRONICLE, March 19, 1989, at A1. These figures at least suggest that § 922(o) succeeded in substantially reducing the number of machine guns in the hands of criminals encountered by federal law enforcement. And the striking effectiveness of federal enforcement of the congressional freeze of the machine gun market gives us reason to think that in 1986 Congress could have mustered facts to support its legislative judgment that the ban would be effective in reducing the availability of machine guns to those confronting federal law enforcement, particularly in the drug trade. That other inferences might be drawn from the data or that there is conflicting data is no answer because our question is not what judges think or prefer, but what rational judgment Congress could have made.

The bill that enacted § 922(o) also imposed on drug traffickers who use a machine gun a special ten-year sentence rather than the standard five-year sentence for other firearms. Pub.L. No. 99-308 § 104, 100 Stat. 456, 457 (May 19, 1986) (amending 18 U.S.C. § 924(c)(1)). Two years later, Congress thought it prudent to add another twenty years to this penalty. Pub.L. No. 100-690 § 6460, 102 Stat. 4373, 4373 (Nov. 18, 1988). This concerted attention to the dangers of automatic weapons is at odds with the suggestion that Congress's freeze on the market in machine guns rests on an irrational judgment about the ties between machine guns and drug dealers and about the effects of tolerating their possession after 1986. Federal law enforcement recognizes the importance of having such powerful weapons in confrontations with drug traffickers. In 1988, DEA, the primary enforcement agency in the regulation of drugs, moved away from shotguns and made 9-mm, 32-round weapons that can be fired automatically its "primary" weapons. U.S. NEWS & WORLD REPORT, April 4, 1988, at 24. These developments make it clear that it is at least rational to conclude that federal regulation of a distinct market in machine guns is part and parcel of federal drug regulation.

Judge Parker in his opinion for the panel found it important that Congress has done more here than outlaw simple possession of a machine gun. We agree. Not every possession is prohibited. Rather, the Congress has left lawful the possession of machine guns manufactured before 1986 and lawfully possessed before that date. It is a crime to transfer any machine gun after 1986 or to possess a machine gun manufactured after that date. That is, Congress froze in place the market in machine guns. Judge Garwood made this point in his opinion for the panel in *Lopez*:

> Section 922(o) is restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported after enactment of the Firearms Owners' Protection Act, which is more suggestive of a nexus to or [e]ffect on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within one thousand feet of the grounds of any school.

2 F.3d at 1356 (emphasis in original) (footnote omitted). It is true that simple possession is the stated offense under the statute, but by excepting activity occurring before 1986, a proscribed possession, by definition, must have been the product of a post-1986 transfer, interstate or intrastate (putting to one side the remote cases of worn guns and, for the moment, cases involving conversion into fully automatic guns). Such careful regulation reflects legislative deliberation we are bound to respect.

Machine guns possess a firepower that outstrips any other kind of gun. Persons knowledgeable about firearms, such as those who campaign for repeal of gun regulations, usually emphasize that machine guns stand in a class of their own. *See Assault Weapons: A View from the Front Lines: Hearing before the Committee on the Judiciary,* 103d Cong., 1st Sess. 183, 185-86 (1994) (emphasizing that the cosmetic similarities between machine guns and semi-automatic assault weapons belie functional differences that make assault weapons more like hunting and target rifles than like machine guns). The destructive capacity of machine guns puts them in the same category as explosives, which the federal government has heavily regulated for over twenty-five years, except machine guns have little lawful use. *See* Organized Crime Control Act of 1970, Title XI, § 1102(a), Pub.L. No. 91-452, 84 Stat. 953-55 (codified as amended at 18 U.S.C. §§ 842-843) (prohibiting, among other things, the storage of explosives without a federal permit); *United States v. Dawson,* 467 F.2d 668, 673 (8th Cir.1972) ("There being a rational basis upon which Congress properly could have determined that the misuse of explosive materials is one activity which, as a class, affects commerce, the Government need not specifically allege and prove a connection between interstate commerce and the conduct made criminal by § 842(h)."), *cert. denied,* 410 U.S. 956, 93 S.Ct. 1427, 35 L.Ed.2d 689 (1973).

This fundamental difference between machine guns and other guns is reflected in the long history of machine-gun regulation by Congress. Initially, Congress used the taxing power to insist upon machine gun registration. *See* National Firearms Act of 1934, Pub.L. No. 474 §§ 2-6, 48 Stat. 1236, 1237-38. It soon turned to the Commerce Clause as a basis for restricting the market in machine guns. *See* Federal Firearms Act of 1938, Pub.L. No. 785, 52

Stat. 1250. That law remained in effect for thirty years, when Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, 82 Stat. 197 (current version at 18 U.S.C. §§ 921-928), of which § 922(o) is now a part. Machine guns, then, have not been the exclusive regulatory domain of the states. Their lethal force has produced a national response.

III.

Those who urge that this legislation is unconstitutional are at pains not to undercut the constitutionality of laws prohibiting the simple possession of drugs. Yet it is difficult to conclude that Congress could not have rationally found that machine guns play a large role in major drug transactions and thus that the availability of these weapons of war has a substantial effect on the interstate traffic in drugs. Congress has acted on that effect in providing that the use of a gun, otherwise lawful, in a drug transaction brings substantially increased penalties. 18 U.S.C. § 924(c)(1). We have repeatedly recognized firearms as one of the drug dealer's "tools of the trade." *See United States v. Martinez,* 808 F.2d 1050, 1057 (5th Cir.), *cert. denied,* 481 U.S. 1032, 107 S.Ct. 1962, 95 L.Ed.2d 533 (1987). The firepower of a machine gun puts it in a quite different category from the handguns, shotguns, and rifles so popular with sportsmen. Its continuous fire puts the machine gun on a different plane from the semiautomatic. The routine cases on the criminal docket in federal courts make the connection between machine guns and major drug transactions undeniable. Whether the effect is "substantial" is less certain, as we have explained. *See supra* at 1000-01. But we need conduct no elaborate study. As shown above, the writing of the popular press and the scale of congressionally-set penalties demonstrate that the baseline of public debate assumes a heavy use of machine guns in drug-related crimes. Significantly, our cases provide anecdotal information that meshes with this data and together would make § 922(o) a rational way to cabin both violence attending the drug trade and the trade itself.[1] The quantity of machine guns that federal courts encounter in drug cases is high enough to conclude that Congress would have had a

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[1] A brief survey of recent federal cases reveals many examples. *See, e.g., Smith v. United States,* 508 U.S. 223, 224, 113 S.Ct. 2050, 2052, 124 L.Ed.2d 138 (1993) (defendant in possession of a fully automatic MAC-10 and MAC-11 machine gun attempts to buy cocaine by selling the MAC-10, a gun that "apparently is a favorite among criminals" because it "can fire more than 1,000 rounds per minute"); *United States v. Powell,* 469 U.S. 57, 59, 105 S.Ct. 471, 473, 83 L.Ed.2d 461 (1984) (search of defendant's car yields, among other things, two kilograms of cocaine and a machine gun); *County Court v. Allen,* 442 U.S. 140, 143, 99 S.Ct. 2213, 2217, 60 L.Ed.2d 777 (1979) (loaded machine gun and more than a pound of heroin found in the trunk of defendants' car); *United States v. Jones,* 102 F.3d 804, 806 (6th Cir.1996) (cocaine dealers attempt to sell federal agents a MAC-10, a MAC-11, and an AK-47, two of which have obliterated serial numbers); *United States v. Agis-Meza,* 99 F.3d 1052, 1054 (11th Cir.1996) (two defendants charged with violation of § 922(o) plead guilty to possession of marijuana); *United States v. Alerta,* 96 F.3d 1230, 1233 (9th Cir.1996) (two brothers arrested for methamphetamine distribution are found in possession of two fully automatic weapons: a MAC-10 and a converted TEC-9); *United States v. Hawthorne,* 94 F.3d 118, 120 (4th Cir.1996) (automatic pistols used during drug transactions); *U.S. v. Ulloa,* 94 F.3d 949, 950-51 (5th Cir.1996) (defendant trading cocaine for five MAC-10's, 48 M-16's, one UZI, and other weapons); *United States v. Cannon,* 88 F.3d 1495, 1505 (8th Cir.1996) ("The record in this case contains evidence that a machine gun is a drug dealer's most prized possession."); *United States v. Moskovits,* 86 F.3d 1303, 1311 (3d Cir.1996)

(affirming a finding that a defendant convicted of distributing cocaine committed perjury when he denied owning a machine gun); *United States v. Blue*, 78 F.3d 56, 58 (2d Cir.1996) (DEA agents discover a machine gun under a mattress while searching an apartment during a cocaine investigation); *United States v. Garcia*, 77 F.3d 274, 275 (9th Cir.1996) (sheriff's deputies discover a machine gun in "a typical stash house where drugs are stored and weapons are kept to protect the merchandise"); *United States v. Buchanan*, 70 F.3d 818, 824-25 (5th Cir.1995) (9mm fully automatic pistol found in car with 280 grams of crack cocaine), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1366, 134 L.Ed.2d 532 (1996); *United States v. Murphy*, 69 F.3d 237, 239 (8th Cir.1995) (defendant convicted of attempt to manufacture methamphetamine, use of a firearm in relation to a drug offense, and possession of a machine gun), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1032, 134 L.Ed.2d 109 (1996); *United States v. Brantley*, 68 F.3d 1283, 1286 (11th Cir.1995) (defendant convicted of both possession of cocaine with intent to distribute and use of a fully automatic firearm in the commission of a drug offense), *cert. denied*, ___ U.S. ___, 116 S.Ct. 964, 133 L.Ed.2d 885, ___ U.S. ___, 116 S.Ct. 1334, 134 L.Ed.2d 484 (1996); *United States v. Zermeno*, 66 F.3d 1058, 1060 (9th Cir.1995) (marijuana, packaging materials, money counters, camouflage gear, two assault rifles, a machine gun, and 1,550 rounds of ammunition found in "stash house"); *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1149 (1st Cir.1995) (M-16 carried onto beach during off-loading of cocaine base from boat), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1879, 135 L.Ed.2d 174 (1996); *United States v. Melendez*, 60 F.3d 41, 44 (2d Cir.1995) (heroin trafficking operation accumulates a number of machine guns and other firearms that were used to protect its operations), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1020, 134 L.Ed.2d 99 (1996), ___ U.S. ___, 116 S.Ct. 900, 133 L.Ed.2d 834 (1996), ___ U.S. ___, 116 S.Ct. 429, 133 L.Ed.2d 345 (1995), ___ U.S. ___, 116 S.Ct. 258, 133 L.Ed.2d 182 (1995); *United States v. Messino*, 55 F.3d 1241, 1245 (7th Cir.1995) (cocaine dealer sells a fully automatic machine gun with a silencer to a confidential rational basis for a legislative judgment that prohibiting their intrastate possession would have a substantial effect on the interstate commerce in illegal drugs.

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informant); *United States v. Davis,* 53 F.3d 638, 639 (4th Cir.1995) (probation of defendant who pled guilty to distributing cocaine revoked after he is seen carrying a machine gun on a college campus); *United States v. Taffe,* 36 F.3d 1047, 1048-49 (11th Cir.1994) (UZI machine pistol equipped with a silencer used in heist of three bales of cocaine and fired at police officers); *United States v. Thomas,* 12 F.3d 1350, 1361-62 (5th Cir.1994) (AR-15 rifle modified to fire as a machine gun used by defendant for protection because of "his line of business" in conspiracy to distribute cocaine, amphetamine, methamphetamine and marijuana), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1861, 128 L.Ed.2d 483 (1994), ___ U.S. ___, 114 S.Ct. 2119, 128 L.Ed.2d 676 (1994); *United States v. Garcia,* 997 F.2d 1273, 1277 (9th Cir.1993) (machine gun used to protect and embolden drug dealer found in house with a kilo of heroin, 4.5 kilos of cocaine, and 1.24 grams of cocaine base); *United States v. Sims,* 975 F.2d 1225, 1230 (6th Cir.1992) (ATF agents discover two AR-15 rifles, converted to fire fully automatically, and 257 rounds of ammunition in the back seat of a car in connection with the arrest of defendants attempting to buy $337,500 worth of cocaine); *United States v. Capote-Capote,* 946 F.2d 1100, 1102-04 (5th Cir.1991) (machine gun used to protect kilogram of cocaine), *cert. denied,* 504 U.S. 942, 112 S.Ct. 2278, 119 L.Ed.2d 204 (1992); *United States v. Moore,* 919 F.2d 1471 (10th Cir.1990) (loaded British Sten machine gun found in open closet of room containing cocaine, ziplock bags, weighing scale, dealing records, $3,400, and a calculator); *United States v. Rogers,* 921 F.2d 1089 (10th Cir.1990) (same facts as recited in Moore), *modified,* 925 F.2d 1285 (10th Cir.), *cert. denied,* 501 U.S. 1211, 111 S.Ct. 2812, 115 L.Ed.2d 985 (1991); *United States v. Lucas,* 932 F.2d 1210, 1223-24 (8th Cir.) (along with thirteen other guns, machine gun "kept at the ready" to safeguard crack house and facilitate illegal manufacture and trade in crack cocaine), *cert. denied,* 502 U.S. 869, 112 S.Ct. 199, 116 L.Ed.2d 159 (1991), 502 U.S. 949, 112 S.Ct.

This rationale would not "convert the commerce power into a reserved 'general federal police power' " (quoting *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1632). As observed, machine guns are very different weapons from guns without the capability of automatic fire and have been the subject of federal commerce regulation for nearly sixty years. We would expect a national rather than a state-by-state regulatory pattern of, say, anti-tank bazookas, plastic explosives, plutonium, or other tools of terrorists. Federal regulation of machine guns, as distinguished from other guns, does not bring similar invasions of traditional state interests. Although § 922(o) and § 922(q) both criminalize the possession of certain guns, § 922(o) ought not be brushed off as a mere "clone" of § 922(q). Of course, the *Lopez* Court insisted that we distinguish between the regulation of crime and the regulation of commercial activity. ___ U.S. at ___-___, 115 S.Ct. at 1630-31.

This case differs from *Lopez* in the critical respect that criminals use machine guns to evade regulation of the national drug trade while guns near schools have a negligible effect on the traditionally local activity of public education, which is not itself commercial. Crime can be interstate business. And local intrastate criminal activity can have a substantial effect on that interstate activity.

399, 116 L.Ed.2d 348 (1991), 502 U.S. 991, 112 S.Ct. 609, 116 L.Ed.2d 632 (1991), 502 U.S. 1100, 112 S.Ct. 1186, 117 L.Ed.2d 429 (1992); *United States v. Matra,* 841 F.2d 837, 839 (8th Cir.1988) (machine gun, along with eight other weapons, made the crack house a "veritable fortress").

Indeed, Congress might rationally conclude that the relationship between "local possession" of machine guns and the drug trade is even more compelling than the ties between local loan sharking and organized crime. *See Perez v. United States*, 402 U.S. 146, 157, 91 S.Ct. 1357, 1362-63, 28 L.Ed.2d 686 (1971) ("[L]oan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and rich alike and siphons funds from numerous localities to finance its national operations.").

The judiciary's role in policing the process of federalism brings hard calls, including the task of distinguishing national economic activity from local crime. *Lopez* is not merely symbolic jurisprudence. Rather, it announces that there are yet limits upon Congress's use of the commerce power to make a federal case out of traditionally local concerns, particularly in criminal law enforcement. That said, we part company with the declaration that § 922(o) is an invasion of the state's traditional police power. That the Congress has attached a criminal penalty to the possession of a machine gun or storage of explosives does not alone mean that it has invaded the traditional police power of the states. With respect, that announces an outcome, not a rationale.

There is no social utility in the distribution of cocaine and marijuana, and their interstate character is undeniable. It is no surprise, then, that Congress "regulates" the national market in these drugs by banning them, a ban that rationally extends to simple possession. There is little social utility in acquiring since 1986 operable machine guns or in making them. They are not sporting weapons; they are weapons of war. They are guns in the same sense that pussycats and tigers are both members of the cat family. The courts have learned that a machine gun's destructive capacity makes it highly useful for protecting commerce in contraband such as narcotics.

Given the rapid influx of machine guns, it is hardly irrational to conclude that meaningful regulation of their use in lines of interstate commerce requires regulation of this intrastate possession. The attempt to distinguish drugs and machine guns on the basis of fungibility fails to appreciate the fact that many guns can easily be converted from semi-automatic to fully automatic. *See, e.g., United States v. Branch,* 91 F.3d 699, 736-37 (5th Cir.1996) (affirming a § 922(o) conviction where the defendant used conversion kits and instructional books and videotapes to manufacture fully automatic weapons out of semi-automatic weapons). News reports describe the process as "so low tech on some brands that [ATF] agents . . . have seen it done with a paperclip." U.S. NEWS & WORLD REPORT, April 4, 1988, at 24. As with drugs, identifying and tracing the fully automatic nature of machine guns is often impossible.

Efforts to minimize the consequences of striking down this statute by reassuring that Congress can cure the defects it finds by inserting a jurisdictional element are empty of content: for example, it can provide penalties for possession of weapons that are "in or affecting commerce." With deference, this velvet over the sword in fact erodes the logic of an otherwise not insubstantial argument. If the present statute cannot be sustained because Congress could not rationally have made a legislative judgment of the need to freeze the post-1986 market, there is little federal regulatory scope left; that reality should be forthrightly acknowledged. If a legislative decision to freeze the class is irrational, proof that an individual member of the class had a substantial effect on commerce in a given case is problematic if "substantial effect" is accorded a constant meaning. So those who would strike this statute cast themselves as protecting state interests by insisting that the Commerce Clause empowers Congress to outlaw only those machine guns where in a specific case the government proves that the use of the machine gun was in commerce or affecting commerce. The irony is that this requirement is more intrusive of state interests than the test we apply and they reject. It is more tolerant of federal intrusion because it may be met by showing merely that a gun "has previously traveled in interstate commerce." *United States v. Bass,* 404 U.S. 336, 350, 92 S.Ct. 515, 524, 30 L.Ed.2d 488 (1971). That is, this minimal nexus to commerce could give Congress more latitude in exercising its federal commerce power than the substantial-effects test we have employed here. A case-by-case inquiry into whether the defendant possessed a gun that was once in interstate commerce, even "after any number of intermediate sales within the State and after any lapse of time," *United States v. Sullivan,* 332 U.S. 689, 693, 68 S.Ct. 331, 333, 92 L.Ed. 297 (1948), would allow federal regulation of items that, taken as a class, have virtually no effect on interstate commerce. It would concede congressional power to outlaw possession of guns in general, an upset of a traditional state-federal balance and a concession we are not persuaded to make. *Lopez* would indeed look more like symbolic jurisprudence with little real implementation of the federalist arrangement of our Constitution. After all, few guns have never crossed a state line. It is not for us to say that *Bass* cannot survive *Lopez*. We would not embrace it, however, to support a rejection of a less intrusive inquiry.

In general, judges are not equipped by training to engage in elaborate empirical studies; more importantly, the courts are institutionally ill-equipped. Deference to Congress does not require courts to leave their traditional roles by pursuing empirical research. But it does require courts not to ignore the obvious, at least when the obvious is born of judicial experience. We need look no further than our considerable experience with the drug market and the role of automatic weapons in that activity. Based on that experience, we are comfortable in concluding that Congress could have rationally found the required nexus between its careful regulation of the possession of machine guns and the interstate commerce in, for example, illegal drugs, as well as the attendant commerce in machine guns alone. The federal government has the power under the Commerce Clause to wage the war on drugs. It equally has the power to freeze the escalating destructive power of the weapons of that war, the automatic firepower drawn by the drug trade.

Automatic and non-automatic weapons fire on different planes, functionally and legally. Guns without the capability of automatic fire are lawfully found in the hands of thousands of persons across the country. The states have traditionally regulated these weapons, indeed virtually all guns, except the machine gun. We weigh the absence of congressional findings against the constitutionality of § 922(o), but given the facts we have outlined conclude that the absence of an invasion of a traditional state interest tilts this case in favor of the constitutionality of the statute. Saying so pulls no teeth from *Lopez* and sounds no retreat from the judicial scrutiny of efforts to make federal cases of state crimes.

EDITH H. JONES, Circuit Judge, joined by GARWOOD, JOLLY, SMITH, DUHE, BARKSDALE, EMILIO M. GARZA and DeMOSS, Circuit Judges, would reverse for the following reasons:

This appeal has provided an occasion for our *en banc* court to consider the breadth of Congress's power to enact criminal laws under the Commerce Clause in light of *United States v. Lopez,* ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The specific issue is whether Congress breached its Commerce Clause authority in enacting 18 U.S.C. § 922(o), which was the basis for appellant Kirk's conviction for the wholly intrastate possession of a machinegun. Half of the judges participating in this en banc[1] rehearing conclude that *Lopez* has more than mere symbolic significance. Carefully applied, it compels the conclusion that the § 922(o) ban on mere intrastate possession of a machinegun exceeds Congress' authority "[t]o regulate Commerce . . . among the several States." U.S. Const., Art. 1, § 8, cl.3. The other half of the participating judges disagree with this conclusion, although their reasoning differs. Kirk's conviction must be affirmed by an equally divided court, but the importance and recurring nature of these issues lead us to publish this opinion.

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[1] Judge Benavides was recused from consideration of this case.

I. BACKGROUND

William J. Kirk was charged in a four-count indictment with violations of 18 U.S.C. § 922(*o*) (1988). The indictment charged Kirk with two counts of unlawful possession of a machinegun (Counts One and Three); and two counts of unlawful transfer of a machinegun (Counts Two and Four).[2] The possession counts make no mention of interstate commerce or of any connection between Kirk's machinegun or his possession of it with commerce, interstate or otherwise. Kirk moved to dismiss the indictment, contending in part that § 922(*o*) exceeds Congress' delegated powers under the Commerce Clause in that it punishes the transfer or possession of a machinegun with no showing that the intrastate transfer or possession affects interstate commerce. The district court denied the motion to dismiss. Kirk then pled guilty to Count One for unlawful possession of a machinegun, reserving his right to appeal the denial of his pre-trial constitutional challenge to § 922(*o*).

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[2] For purposes of 18 U.S.C. § 922(*o*), a "machinegun" is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845(b) (1988); *see* 18 U.S.C. § 921(a)(23).

A divided panel of this court rejected Kirk's constitutional challenge and affirmed his conviction. *United States v. Kirk,* 70 F.3d 791 (5th Cir.1995), *reh'g en banc granted,* 78 F.3d 160 (5th Cir.1996). Because this case poses similar constitutional questions to those presented in *United States v. Lopez,* ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), we granted rehearing *en banc,* vacating the panel opinion to determine the constitutionality of the § 922(*o*) ban on the possession of machineguns.[3]

II. PREFACE

The language and legislative history of § 922(*o*) and a brief discussion of *Lopez* form a backdrop for further analysis.

A. Section 922(*o*)

In 1986 Congress amended the Gun Control Act of 1968, 18 U.S.C. §§ 921-28, with the passage of the Firearms Owners' Protection Act (FOPA), Pub.L. No. 99-308, 100 Stat. 449 (1986). Section 102(9) of FOPA added § 922(*o*) to the existing statute. 100 Stat. at 453. Section 922(*o*) provides:

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[3] With certain exceptions, § 922(*o*) bans both the transfer and possession of machineguns. *See infra* part II. We need not consider here the constitutionality of § 922(*o*)'s restriction on the transfer of machineguns. The prohibition on the transfer of machineguns raises different constitutional questions than those raised by § 922(*o*)'s ban on their mere possession.

> (*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to –
>
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

18 U.S.C. § 922(*o*). Section 922(*o*) became effective May 19, 1986. *See* FOPA § 110(c), 100 Stat. at 461 (effective date).

The legislative history of § 922(*o*) is sparse. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective,* 17 Cumb. L.Rev. 585, 669-71 (1987). Section 922(*o*) was added to FOPA as a last minute amendment on the House floor and its provisions were not debated. *See United States v. Wilks,* 58 F.3d 1518, 1519 (10th Cir.1995); *United States v. Lopez,* 2 F.3d 1342, 1356 (5th Cir.1993), *aff'd,* ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); 132 Cong. Rec. H1750-52 (daily ed. April 10, 1986); Hardy, *supra,* at 670. The only apparent explanation for § 922(*o*) is a statement from its sponsor, Representative Hughes, who, rushing to explain his position before the time for debate expired, stated, "I do not know why anyone would object to the banning of machineguns." 132 Cong. Rec. H1750 (daily ed. April 10, 1986). No other reference to § 922(*o*) appears in committee reports or elsewhere, with the exception of a brief Senate colloquy primarily concerned with the scope of the provision's exemptions as they relate to machinegun manufacturers and government-authorized machineguns. 132 Cong. Rec. S5358-62 (daily ed. May 6, 1986); Hardy, *supra,* at 670-71 & nn. 462-463.[4] Thus, the legislative history of § 922(*o*) itself provides no insight into the relationship between § 922(*o*) and interstate commerce.

B. United States v. Lopez

In *United States v. Lopez,* ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court considered the constitutionality of 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V), which banned the possession of firearms near a school and which had been overturned in this court.

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[4] Following a colloquy between Senators Hatch and Dole concerning the exemptions contained in § 922(*o*), Senator Metzenbaum expressed concern that the colloquy did not express the correct interpretation of the amendment. In partial response, Senator McClure stated: "I know that the Senator [Metzenbaum] from Ohio has interposed a reservation with respect to my request. I take this time only to say to the Senator from Ohio that this discussion [concerning § 922(*o*)] is up at all because the other body injected some language at the very last minute, literally, of their debate, and there is no legislative history as to what that language means. There are a substantial number of House Members as well as other interested parties who have asked questions about what it means; and what we are trying to do is provide some legislative history as to our understanding of what the House provision means, since the House itself had no legislative history on this subject." 132 Cong. Rec. S5361-62 (daily ed. May 6, 1986).

United States v. Lopez, 2 F.3d 1342 (5th Cir.1993).[5] The Court recognized that Congressional power over interstate commerce under the Commerce Clause extends to (1) legislation regulating "the use of the channels of interstate commerce;" (2) laws regulating and protecting "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) regulations of intrastate activities that have a substantial effect on interstate commerce. *Id.* at ___-___, 115 S.Ct. at 1629-30.

Each of these categories of cases represents a distinct way, exemplified by the Court's chosen citations, to describe the impact of federal legislation upon interstate commerce. *See United States v. Robertson,* ___ U.S. ___, 115 S.Ct. 1732, 131 L.Ed.2d 714 (1995). Before going further, we note that although *Lopez* does not explicitly abandon the deferential rational basis standard of review, *see, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 276-80, 101 S.Ct. 2352, 2360-61, 69 L.Ed.2d 1 (1981), neither does the Court defer unblinkingly to Congress's judgment. Indeed, the Court's citations emphasize that it is the judicial duty ultimately to review conformity of legislation to the Commerce Clause. *Lopez,* ___ U.S. at ___ n. 2, 115 S.Ct. at 1629 n. 2; *see also Hodel,* 452 U.S. at 311, 101 S.Ct. at 2391-92 ("simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (Rehnquist, J. concurring in judgment). As *Lopez* demonstrates, exercise of this duty requires independent judicial scrutiny of the reasons advanced to explain why the regulation is necessary to protect interstate commerce. Even a statutorily imposed requirement of a jurisdictional nexus to interstate commerce will not insulate a provision from judicial review. *See, e.g., United States v. Pappadopoulos,* 64 F.3d 522, 527 (9th Cir.1995).[6]

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[5] Section 922(q)(1)(A) was enacted as part of the Gun-Free School Zone Act of 1990 and provides: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."

Moving to a more detailed consideration of the *Lopez* categories, regulation of the "channels of interstate commerce," the first category, is limited to direct regulation of the interstate channels themselves. The cases cited in *Lopez,* or by its reference to *Perez v. United States,* 402 U.S. 146, 148, 91 S.Ct. 1357, 1359, 28 L.Ed.2d 686 (1971), to describe the first category involve statutes that contain an express jurisdictional nexus element. *See, e.g.,* 18 U.S.C. §§ 2312-2315 (interstate shipment of stolen goods); 18 U.S.C. § 1201 (interstate transport of kidnaping victims); *United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed.

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[6] " . . . where Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a 'substantial' effect on or connection to interstate commerce." *Pappadopoulos,* 64 F.3d at 527 (holding arson directed against a private home not sufficiently related to interstate commerce).

609 (1941) (regulation of working conditions in the production of goods "for interstate commerce"). This category must be limited to legislation that specifically reaches interstate transfers, possessions, and transactions and business "engaged in commerce." *United States v. Robertson, supra* at ___, 115 S.Ct. at 1733 (goldmine "engaged in commerce").

The second category of Commerce Clause power permits laws regulating or protecting instruments of interstate commerce, or persons or things in interstate commerce, even though the threat may derive from intrastate activity. The Court cites in this connection the *Shreveport Rate Cases,* 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914), which upheld rate regulation of a railroad engaged in interstate commerce, and *Southern Railway Company v. United States,* 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911), permitting regulation of interstate railway safety. The Court also cites a statute criminalizing the destruction of aircraft used in interstate commerce, 18 U.S.C. § 32, and vehicle thefts from interstate shipments, 18 U.S.C. § 659. This category includes regulation or protection pertaining to instrumentalities or things as they move in interstate commerce.

With regard to the third category of cases, as the Court put it, "the pattern is clear." *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1630. Federal regulation of even intrastate economic activity will be sustained if the activity substantially affects interstate commerce. The Court's citations again bear out its purpose. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 276-280, 101 S.Ct. 2352, 2360-61, 69 L.Ed.2d 1 (1981) (upholding regulation of intrastate coal mining); *Perez v. United*

States, supra (intrastate extortionate credit transactions); *Katzenbach v. McClung,* 379 U.S. 294, 299-301, 85 S.Ct. 377, 381-382, 13 L.Ed.2d 290 (1964) (restaurants utilizing substantial interstate supplies); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 252-253, 85 S.Ct. 348, 354-355, 13 L.Ed.2d 258 (1964) (inns and hotels catering to interstate guests). All of the cases involved economic regulations or legislation bearing on commercial activity, and in those cases, the intrastate activity either substantially affected interstate commerce, or it had to be regulated in order not to undercut a federal commercial regulatory scheme. *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1631.[7]

The Court majority agreed that § 922(q) neither regulates "the channels of interstate commerce" nor protects "an instrumentality of interstate commerce or a thing in interstate commerce," *id.* at ___, 115 S.Ct. at 1630. The problem in *Lopez* centered on the third category of Commerce Clause power. There are three steps to the Court's analysis of the substantial effects test. The threshold question is whether the local activity sought to be regulated is commercial in nature, or whether its regulation is necessary to effectuate federal regulation of a larger commercial activity. The majority agreed that the ban on possession of a gun in a school zone fails to "substantially affect any sort of interstate commerce." *Id.* at ___, 115 S.Ct. at 1634. Further, § 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at ___-___, 115 S.Ct. at 1630-31. The majority easily rejected the notion that the act of possessing a gun in a school zone is subject to federal regulation because, viewed in the aggregate, such acts substantially affect interstate commerce. *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1631. What this means is that non-commercial intrastate acts may not be deemed commercial, for purposes of extending federal regulation, simply by considering them *en masse;*[8] such activities are only subject to federal regulation if their regulation is essential to a larger economic regulatory scheme. *Lopez* thus holds that "commercial activity" is not a definitional vacuum waiting to be filled by a creative Congress and judges. While the Court acknowledges that characterizing an intrastate activity as commercial or non-commercial may create some legal uncertainty, ___ U.S. at ___, 115 S.Ct. at 1633, the Court's conclusion regarding the purely criminal provision, § 922(q), caused no interpretive difficulty to the majority. *Lopez* sends a clear cautionary signal that federal criminalization of intrastate noneconomic activity, when such regulation is not essential to a broader regulation of commercial activity, will have difficulty satisfying the substantial effects basis for Commerce Clause regulation.

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[7] *See also United States v. Robertson, supra,* ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects."); *United States v. DiSanto,* 86 F.3d 1238, 1245 (1st Cir.1996).

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[8] This reasoning does not undermine *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), because the farmer's activity there, albeit local, directly distorted the federally controlled market for wheat. *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1630. Nevertheless, the Court's analysis does not hold that any intrastate commercial activity is regulable by Congress simply because it is commercial – the substantial effects test must be met to ensure a sufficient connection with interstate commerce.

The second element of the substantial effects test is whether the statute contains a jurisdictional nexus to interstate commerce. *Lopez* commented on the absence of any jurisdictional nexus requirement in § 922(q) that would insure, through case-by-case inquiry, that a particular firearm possession substantially affects interstate commerce. *Lopez* illustrated how a jurisdictional nexus requirement could save a statute from Constitutional infirmity by describing *United States v. Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). The provision at issue in *Bass* criminalized, *inter alia,* a felon's possession of a firearm "in commerce or affecting commerce." Former 18 U.S.C. § 1202(a). The government convicted Bass without offering proof of a nexus to interstate commerce. The Court reversed the conviction for this omission and "thus interpreted the statute to reserve the Constitutional question whether Congress could regulate, without more, the 'mere possession' of firearms." *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1624 (citing *Bass,* 404 U.S. at 339, n. 4, 92 S.Ct. at 518, n. 4). As previously noted, a jurisdictional nexus requirement does not *ipso facto* validate a statute against an as-applied Commerce Clause challenge,[9] but its existence is reassuring against a facial challenge.

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[9] *See United States v. Collins,* 40 F.3d 95, 99-101 (5th Cir.1994) (robbery of an individual victim lacks sufficient nexus to interstate commerce to prosecute under Hobbs Act).

The final element of the substantial effects inquiry is whether there are limits in the statute that mark a boundary of some sort between matters of truly national concern and those traditionally subject to state regulation. In this connection, the Court acknowledged that legislative findings, while not legally necessary, would facilitate judicial review of the substantial effects question. *Lopez,* ___ U.S. at ___-___, 115 S.Ct. at 1631-32; *Perez, supra,* 402 U.S. at 156, 91 S.Ct. at 1362. No such findings accompanied § 922(q), however. The Court also agreed with the Fifth Circuit[10] that legislative findings pertaining to previous firearms statutes could not be imported into the analysis of § 922(q). ___ U.S. at ___, 115 S.Ct. at 1632. The Court finally rejected both the "costs of crime" and "national productivity" theories proffered by the federal government to demonstrate substantial interstate commerce effects, and it rejected Justice Breyer's equation of education with commercial activity. ___ U.S. at ___-___, 115 S.Ct. at 1632-34. Neither of these attenuated strings of logic, according to *Lopez,* furnishes any principled limit on federal power in areas such as criminal law enforcement or education, where states have traditionally been sovereign.

III. DISCUSSION

On its face, § 922(*o*) seems a clone of § 922(q), the provisions struck down in *Lopez*. The statute bans for present purposes "mere possession" of machineguns manufactured or imported after 1986; it is supported neither by a jurisdictional nexus requirement nor by salvaging legislative findings; it is a criminal, not an economic regulatory provision; and it clearly overlaps state and local law enforcement authority. Other circuit courts and other judges in this court, however, have not seen it that way,[11] although their reasons for upholding the statute differ significantly. Most of these cases err by assuming that every intrastate possession of machineguns involves interstate commerce. That error leads to misapplication of the first and second categories of Commerce Clause cases described by *Lopez,* and to an untenable distinction between § 922(*o*) and § 922(q) when the third *Lopez* category is considered. The errors in other cases are best exposed by our analysis,[12] which will discuss

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[10] *United States v. Lopez,* 2 F.3d at 1366.

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[11] *United States v. Kenney,* 91 F.3d 884 (7th Cir.1996); *United States v. Beuckelaere,* 91 F.3d 781 (6th Cir.1996); *United States v. Rambo,* 74 F.3d 948 (9th Cir.1996); *United States v. Wilks,* 58 F.3d 1518 (10th Cir.1995); *United States v. Rybar,* 103 F.3d 273 (3d Cir.1996).

[12] Judge Parker and Judge Higginbotham imply that this analysis strays from the rational basis test for evaluating the constitutionality of legislation. Not so. First, as a general principle, following *Lopez,* the rational basis test will apply the data created, referenced or expressed by Congress in conjunction with an enactment to the three aspects of federal commerce clause power described in *Lopez.* That is what we have done here, hampered by the absence of data from Congress concerning how banning the possession of machineguns nationwide involves or substantially affects interstate commerce. Second, the rational basis test assumes the existence of data created or referenced in the legislative process whose rationality can be analyzed. Here, there are no relevant data relating the ban on mere intrastate possession of machineguns by § 922(*o*) to Congress's interstate commerce jurisdiction. There are no legislative findings, no committee reports, and no

§ 922(*o*) under each category of *Lopez*, and which takes *Lopez* seriously as establishing at least an outer boundary on Congress's criminal jurisdiction under the Commerce Clause.[13]

A. Does § 922(*o*) Regulate "Channels of" or "Things in" Interstate Commerce?

The Government contends that § 922(*o*) may be justified under either of the first two *Lopez* categories, as a

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pertinent Congressional debate that "would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye. . . . " *Lopez*, ___ U.S. at ___, 115 S.Ct. at 1632. Most important, there is neither an explicit jurisdictional nexus requirement nor any other tie to interstate commerce apparent from the statutory architecture. It is not this court's responsibility or place to invent a rational basis for Congress. Third, the absence of such data mirrors the situation before the Court in *Lopez* and reinforces the consistency between these two cases. In *Lopez*, Congress had not endeavored in § 922(q) to express any connection between interstate commerce and possession of a gun in a school zone. Unlike the majority, the dissent there was willing to create a factual backdrop for the statute, just as Judges Parker and Higginbotham seek to do here.

[13] It would be a mistake to argue that because Justices Kennedy and O'Connor concurred in *Lopez* and joined a separate writing, the *Lopez* analysis is not definitive. The two justices joined and endorsed Justice Rehnquist's majority opinion. ("As the Chief Justice explains, unlike the earlier cases to come before the Court, here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus.") *Lopez*, ___ U.S. at ___, 115 S.Ct. at 1640 (Kennedy, J., citing Rehnquist opinion).

regulation of the channels of interstate commerce or of a thing in interstate commerce. There is circuit court support for each position. *See United States v. Wilks,* 58 F.3d 1518 (10th Cir.1995) (upholding § 922(*o*) as regulation of a thing in interstate commerce); *United States v. Rambo,* 74 F.3d 948 (9th Cir.1996) (§ 922(*o*) valid as regulation of channels of interstate commerce); *United States v. Beuckelaere,* 91 F.3d 781 (6th Cir.1996) (§ 922(*o*) valid under all three *Lopez* categories); *but see United States v. Kenney,* 91 F.3d 884 (7th Cir.1996) (§ 922(*o*) upheld only under substantial effects prong of *Lopez*).

1. The Channels of Interstate Commerce

Recourse to the first two *Lopez* categories suffers initially, however, from a serious factual error. Proponents of the constitutionality of § 922(*o*) assume that every possession of a machinegun manufactured after May 19, 1986, excepting only the narrow class of possessions permitted in the statute, connotes that the gun traveled or was transferred in interstate commerce. These decisions overlook that an automatic weapon may be created by modifying a semiautomatic weapon, *see United States v. Jones,* 976 F.2d 176, 178 (4th Cir.1992), *cert. denied* 508 U.S. 914, 113 S.Ct. 2351, 124 L.Ed.2d 260 (1993) (describing home conversion of shotguns), or that it may evolve from ordinary wear and tear on a semiautomatic firearm. In *United States v. Anderson,* 885 F.2d 1248, 1250-51 (5th Cir.1989) (*en banc*), this court recognized that "[s]everal of the most popular shotgun models, many handguns, and not a few rifles" can by "either wear and tear or a simple operation" become "machineguns" within the statutory definition. Section 922(*o*) would therefore prohibit the simple possession of an ordinary semi-automatic pistol whose sear wore off in 1987. Shorn of the misunderstanding that illegal possession cannot occur without illegal transfer[14], § 922(*o*) plainly reaches mere intrastate possession of machineguns as well as possession of machineguns which have illegally moved or been transferred in interstate commerce. Any decision upholding § 922(*o*) under *Lopez* must come to grips with this reality.

Rambo, for instance, seeks to justify § 922(*o*) as regulating the channels of interstate commerce because it is "an attempt to prohibit the interstate transportation of a commodity through the channels of commerce." *Rambo,* 74 F.3d at 951, citing *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1630. But because § 922(*o*) also prohibits purely intrastate possession of machineguns, *Rambo*'s logic proves too much. The first *Lopez* category, as earlier described, included cases that were distinguished by express jurisdictional nexus requirements to movements or transactions in interstate commerce. In *Kenney,* the court rejected the channels of commerce rationale for § 922(*o*) on this basis:

> . . . although it may be true that Congress must regulate intrastate transfers and even mere possessions of machineguns in aid of its prerogative of preventing the misuse of the channels of

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[14] *United States v. Kirk,* 70 F.3d 791, 796 (5th Cir.1995); *Rambo, supra,* 74 F.3d at 952 (same); *Beuckelaere, supra,* 91 F.3d at 783 (same).

> interstate commerce, the regulation still regulates much more than the channels of commerce.

91 F.3d at 889.

Lopez summarily rejected the argument that banning firearm possession in school zones regulates the channels of commerce. Section 922(*o*) does not more clearly express a nexus to channels of commerce than did its virtual clone, § 922(q), the *Lopez* provision. To disregard the similarity of the provisions trifles with *Lopez*. Section 922(*o*) is limited neither to transfers nor to possession in or even affecting interstate commerce. It criminalizes, as in this case, the mere possession of a machinegun independent of any type of transfer. This provision does not regulate the channels of interstate commerce. Decisions like *Rambo* and the panel opinion, in holding otherwise, have distorted the channels of commerce rationale and are attempting to read a statute which does not exist.

Cases relying on the channels of commerce rationale also misplace emphasis on the temporal limit on the possession ban and the dangerousness of the product. Neither of these characteristics more closely aligns § 922(*o*) with a regulation of the channels of interstate commerce. The grandfather clause of the ban applies it only to machineguns manufactured or imported after May of 1986, but that feature fails to enhance its relation to interstate commerce.[15] After 1986, both interstate and wholly intrastate private possessions are prohibited, yet there are no Congressional findings that this drastic impact upon intrastate activity was connected to or mandated by a relation to the channels of interstate commerce. Similarly, the fact that machineguns are a dangerous commodity does not place them more or less within the channels of commerce for purposes of federal regulation. *United States v. Bishop,* 66 F.3d 569, 587 n. 28 (3d Cir.1995) ("The dangerousness of the object is not the source of Congressional power; the connection to interstate commerce is.") Baseball cards as well as toxic chemicals can be regulated by Congress only if there is a necessary relationship to interstate commerce. The argument based on dangerousness is more closely attuned to justifying a national police power than a national commerce power. *Lopez* reminded us that the Constitution does not confer a general police power upon the federal government. *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1634.

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[15] The effect of the grandfather clause does, paradoxically, assure a nexus between interstate commerce and criminal possession of pre-1986 *unlawfully* possessed machineguns, because, as this court's *Lopez* opinion noted, pre-1986 regulatory laws expressly embodied a jurisdictional nexus to commerce. *See Lopez*, 2 F.3d at 1356, n. 29.

2. Things in Interstate Commerce

The flawed premise underlying regulating machineguns as "things in interstate commerce" is that they are by their nature a commodity "transferred across state lines for profit by business entities." *Wilks,* 58 F.3d at 1521 (citation omitted). We agree again with the Seventh Circuit's criticism of this reasoning, because "the regulation is much broader than the category." *Kenney,* 91 F.3d at 889. The second *Lopez/Perez* category, as previously explained, includes regulations of instrumentalities or things – such as interstate transportation rates and safety regulations – whose nexus to interstate commerce is obvious. Thus, again to quote *Kenney*:

> The *Wilks* court's observation that "[t]he interstate flow of machineguns 'not only has a substantial effect on interstate commerce; it *is* interstate commerce,' " 58 F.3d at 1521 [(quoting *United States v. Hunter,* 843 F.Supp. 235, 249 (E.D.Mich.1994)) (emphasis in original)], is correct as far as it goes, but it does not address the different question of the propriety of § 922(*o*)'s regulation of intrastate possession and transfer.

91 F.3d. at 889.

Criminal possession of a machinegun after May 19, 1986 under § 922(*o*) is not dependent on or related to the movement of the machinegun in interstate commerce, and it is ***not*** "bound up with interstate attributes." *Wilks,* 58 F.3d at 1521. Further, not all commerce is interstate commerce, as commerce "which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other States" is not commerce within the meaning of the Commerce Clause. *Gibbons v. Ogden,* 9 Wheat. 1, 22 U.S. 1, 194, 6 L.Ed. 23 (1824). The *Wilks* reasoning makes the things in commerce basis of Commerce Clause regulation limitless, contrary to its purpose.

Nor are we persuaded that § 922(*o*) can be upheld on the basis of legislative findings – eighteen years old when

§ 922(*o*) was enacted – contained in the Omnibus Act[16] and the Gun Control Act of 1968.[17] Cases such as *Wilks* have sought to enhance the things in commerce rationale by describing § 922(*o*) as an incremental development in a seamless web of federal firearm regulation. *Wilks,* 58 F.3d at 1521-22. But as explained in detail by Judge Garwood's opinion in *Lopez,* all previous federal gun control laws have been expressly tied to the conduct of the firearms business, a business whose inter- and intra-state activities are clearly commercial. *See Lopez,* 2 F.3d at 1348-57. The Supreme Court in *Lopez* approved this court's reading of the general legislative history and pattern of previous federal firearms legislation, *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1632, and refused to rest on Congressional findings from other statutes to justify § 922(q). *Id.* at ___, 115 S.Ct. at 1632. Like the Supreme Court in *Lopez,* and unlike *Wilks,* we find reliance on Congressional findings from previous federal firearms legislation inappropriate to support the § 922(*o*) possession ban. *See Lopez,* 2 F.3d at 1357 n. 31.

Reliance on findings from other legislation not only contradicts the Supreme Court, it is a misleading indicator of the relevant gun control law. The Congressional findings relating to FOPA indicate that the Act's purpose was to *secure* the rights of citizens to possess firearms and to ensure that no *"undue or unnecessary Federal restrictions"* are placed on citizens "with respect to the acquisition, possession or use of firearms." FOPA § 1(b)(2), 100 Stat. at 449 (emphasis added) (*quoting* Gun Control Act of 1968 § 101, 82 Stat. at 1213-14 (1968)).[18] Neither the language of § 922(*o*) nor its legislative history provides any indication that Congress viewed the prohibition on possession of machineguns as an essential part of a broader regulatory scheme or that Congress considered the relationship between the ban on possession of machineguns and interstate commerce.

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[16] Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, 82 Stat. 197 (1968).

[17] Gun Control Act of 1968, Pub.L. No. 90-618, 82 Stat. 1213 (1968).

In comparison to § 922(*o*), which lacks any reference to interstate commerce, Congress specifically tied other regulations enacted concurrently with § 922(*o*) to interstate commerce. FOPA § 102, 100 Stat. at 451-52.[19] Two

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[18] Additionally, § 1 of FOPA contains Congressional findings that the rights of citizens "to keep and bear arms under the second amendment of the United States Constitution . . . require[s] additional legislation to correct existing firearms statutes and enforcement policies." FOPA § 1(b)(1)(A), 100 Stat. at 449.

[19] Section 922(g) was amended to provide that it would be unlawful for certain persons (as defined by § 922(g)) – "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." FOPA § 102, 100 Stat. at 452.

Section 922(h) was replaced in its entirety and states: "It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment – (1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign other provisions contained in § 922 were amended and one new subsection was added to § 922(*o*). FOPA § 102, 100 Stat. at 451-53. Congress thus maintained the "basic jurisdictional structure" found in previous firearms legislation, which required the "licensing of all firearms dealers and manufacturers, . . . and in all other instances [provided] an express nexus either to interstate commerce or to the activity of, or dealing with, federally licensed dealers or manufacturers. . . . " *Lopez,* 2 F.3d at 1354. Unlike § 922(*o*) and (q), these other regulations, however, are grounded in either Congress' taxing powers, or are expressly tied to interstate or foreign commerce. *Id.* at 1354-57. Neither the language of § 922(*o*) nor its legislative history supports a finding that the ban on possession of machineguns regulates only machineguns connected with interstate commerce. *See supra* part II.A. Section 922(*o*) stands isolated from the rest of the FOPA because it conspicuously lacks either a nexus to commerce or the support of findings that banning mere intrastate possession of machineguns is essential to effectuate federal regulation. Section 922(*o*) cannot be upheld as a permissible regulation of a "thing" in interstate commerce.[20]

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commerce; or (2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." *Id.*

Section 922(n) was added to § 922 and provides: "It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate commerce." *Id.*

[20] Section 922(*o*) also does not regulate an "instrumentality" of interstate commerce. Like § 922(q) in *Lopez,*

B. Does § 922(*o*) "Substantially Affect" Interstate Commerce?

The essential question in this case as in *Lopez* becomes whether § 922(*o*) represents a valid exercise of Congressional authority to regulate an activity "substantially affecting" interstate commerce. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1630.

The Government contends that § 922(*o*) has the requisite effect, as it is part of a comprehensive approach to the regulation of machineguns and that a single intrastate possession or transfer of a machinegun is nationally significant because of the cumulative effect such a transaction has on the supply-and-demand for machineguns. In a similar vein, *Kenney* argues that both the nature of § 922(*o*) and the history of federal firearms legislation support the provision's consistency with the post-*Lopez* scope of the Commerce Clause. *Kenney* first analogizes the banning of private post-1986 machinegun possession to the farmer's harvest of excessive wheat in *Wickard v. Filburn,* 317 U.S. at 125, 63 S.Ct. at 89, and concludes, " . . . there is a rational basis to regulate the local conduct of machinegun possession, including possession resulting from home manufacture, to effectuate § 922(*o*)'s purpose of freezing the number of legally possessed machineguns at 1986 levels, an effect that is closely entwined with regulating interstate commerce." 91 F.3d at 890. *Kenney* also describes the possession ban as rooted in a sixty-year history of federal machinegun regulation and thus as an incremental step in federal firearms regulation; it is a measure commanding "deference to Congress's accumulated institutional expertise." *Id.*

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§ 922(*o*) regulates mere possession of a machinegun, regardless of its movement in interstate commerce. *See Lopez,* ___ U.S. at ___, 115 S.Ct. at 1630; *see also Perez v. United States,* 402 U.S. 146, 150, 91 S.Ct. 1357, 1359, 28 L.Ed.2d 686 (1971) (aircraft are instrumentalities); *Houston & Shreveport R. Co. v. United States,* 234 U.S. 342, 351, 34 S.Ct. 833, 836, 58 L.Ed. 1341 (1914) (interstate carriers are instruments of interstate commerce). Section 922(*o*) therefore fails to regulate an instrumentality of interstate commerce.

Among the three elements of *Lopez's* substantial effects test, the first and most critical is that of characterization: whether § 922(*o*) fulfills the mission of regulating interstate commerce as (1) a regulation of economic activity which, although itself local, has substantial effect on interstate commerce, or (2) a regulation of activity which is essential to maintaining a larger, interstate regime of economic regulation. Neither *Kenney* nor the government in supporting § 922(*o*) has characterized it as a regulation of economic activity. It is not. It is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez,* ___ U.S. at ___ - ___, 115 S.Ct. at 1630-31.

Defenders of § 922(*o*) argue instead that the possession ban is an essential part of the regulation of "commercial activity," either to insure federal control of the market for machineguns or to enforce a freeze on the number of available machineguns. *See, e.g. Beuckelaere,* 91 F.3d at 785; *Kenney,* 91 F.3d at 890. No doubt Congress has undertaken fully to regulate the business of firearms dealing, insofar as sales and transfers in or affecting commerce are concerned.[21] But as we have repeatedly noted, mere intrastate possession of a machinegun does not necessarily involve a transfer or an economic transaction of any kind.[22]

Moreover, the analogy to *Wickard* is flawed. In *Wickard,* the government's agricultural program aimed to control and support prices in the wheat market. Filburn's consumption of home-grown wheat substituted for the controlled wheat, impairing to that extent the price support effort. Section 922(*o*), by contrast, intends to extirpate any domestic commercial market for machineguns manufactured or imported after 1986. Even if this goal constitutes a legitimate regulation of interstate commerce, it does not follow that criminalizing purely private, intrastate possession is necessary to eliminate the market. Section 922(*o*) also prohibits transfers of machineguns and, to the extent it represents a permissible exercise of Commerce Clause power,[23] that prohibition aims directly and completely at commercial activity in machineguns. Private possession of a machinegun does not involve a market activity, and there is no legitimate market in which a substitution effect would occur.

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[21] *See generally Lopez,* 2 F.3d 1342, 1348-1360 (Garwood, J.), reciting the history of federal firearms legislation.

[22] Taking a different slant at the substantial effects test, Judge Higginbotham's novel approach to the test pays verbal obeisance to *Lopez* while seriously undermining it. Judge Higginbotham posits that rational basis review should lead federal courts to uphold the possession ban based on "facts . . . within our [judges'] easy reach." Lacking any data from the legislative process, his opinion stitches together bits of news articles, statistics, and Congressional testimony from unrelated hearings to conclude that Congress might have banned machinegun possession to stem the illegal drug trade. His is an interesting empirical creation, but methodologically it follows Justice Breyer's *dissent* in *Lopez.* More troubling, Judge Higginbotham's opinion begs the question: it never explains why banning the wholly intrastate, non-crime-related, noncommercial personal possession of a machinegun is reasonably or substantially necessary to control use of these firearms in the illegal drug trade or other interstate commerce. Unlike the *Lopez* majority, his opinion ultimately substitutes wholesale deference to Congress for any attempt to define the boundaries of the commerce clause, even in noncommercial criminal statutes like § 922(*o*).

Another way of explaining the superfluousness of the § 922(*o*) ban on possession is to compare firearms regulation to the narcotics trafficking laws. Not only are most of those criminal provisions also expressly tied to the commerce in illegal controlled substances, but Congress also made extensive findings to establish the necessary relationship of possession and intrastate trade to the overall scheme. *See, e.g., United States v. Leshuk,* 65 F.3d 1105, 1112 (4th Cir.1995); *Lopez,* 2 F.3d at 1367, n. 51; *United States v. Lopez,* 459 F.2d 949, 951-53 (5th Cir.), *cert. denied sub nom. Llerena v. United States,* 409 U.S. 878, 93 S.Ct. 130, 34 L.Ed.2d 131 (1972).[24] The nature of controlled substances supports Congress's findings: they are fungible, and their intrastate, interstate or imported origin is often impossible to discern. Firearms, including machineguns, are identifiable and traceable. Banning private, intrastate machinegun possession is not an essential link in the chain of federal regulation of firearms dealing.

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[23] Not all transfers are commercial in nature. Transfers by gift or by succession would not be.

[24] *See United States v. Genao,* 79 F.3d 1333 (2d Cir.1996) (upholding 21 U.S.C. §§ 841, 846); *United States v. Leshuk,* 65 F.3d 1105 (4th Cir.1995) (21 U.S.C. § 841(a)(1)); *United States v. Clark,* 67 F.3d 1154 (5th Cir.1995) (upholding 21 U.S.C. § 860), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1432, 134 L.Ed.2d 554 (1996); *United States v. Tucker,* 90 F.3d 1135 (6th Cir.1996) (same); *United States v. Bell,* 90 F.3d 318 (8th Cir.1996) (upholding 21 U.S.C. § 841(a)(1)); *United States v. Brown,* 72 F.3d 96 (8th Cir.1995)

Kenney also asserts that because Congress has historically regulated firearms and has evinced particular interest in regulating machineguns, its "accumulated institutional expertise" justifies § 922(*o*). This argument might be called "the nose under the camel's tent" theory of Commerce Clause power: once Congress has begun to regulate a particular activity, courts should defer to any extensions of regulation that Congress legislates. Surely this position renders any theoretical limit on the enumerated Commerce Clause power nugatory.

(same); *United States v. Yoon*, No. 95-16698, 1996 WL 367621 (9th Cir. June 28, 1996) (unpublished per curiam) (upholding 21 U.S.C. § 841(a)(1)); *United States v. Wacker*, 72 F.3d 1453 (10th Cir.1995) (upholding 21 U.S.C. §§ 841(a)(1), 846); *United States v. Kremetis*, 903 F.Supp. 250 (D.N.H.1995) (same); *United States v. Smith*, 920 F.Supp. 245 (D.Me.1996) (upholding 21 U.S.C. §§ 841(a)(1)-(2), 846); *United States v. Salmiento*, 898 F.Supp. 45 (D.P.R.1995) (upholding 21 U.S.C. § 860); *United States v. Gonzalez*, 893 F.Supp. 935 (S.D.Cal.1995) (upholding 21 U.S.C. § 841(a)(1)); *United States v. Garcia-Salazar*, 891 F.Supp. 568 (D.Kan.1995) (upholding 21 U.S.C. § 860); *United States v. Murillo*, No. CR 93-20131 JW, 1995 WL 621797 (N.D.Cal.1995) (upholding 21 U.S.C. §§ 841(a), 843(b), 846); *United States v. Grafton*, 1995 WL 506001 (N.D.Ga.1995) (upholding 21 U.S.C. §§ 841, 846); *United States v. Walker*, 910 F.Supp. 837 (N.D.N.Y.1995) (upholding 21 U.S.C. §§ 841, 846, 848); *United States v. Bramble*, 894 F.Supp. 1384 (D.Haw.1995) (upholding 21 U.S.C. §§ 841(a)(1), 844(a)).

Because we have concluded that mere intrastate possession is neither an economic activity nor an intrastate activity whose regulation is essential to a larger commercial regulatory regime, § 922(*o*) cannot pass muster under the *Lopez* substantial effects test. Reinforcing this conclusion, although not necessary to it, are the results of the other two parts of the test, which deal with Congressional findings and the limits on federal authority.

If Congress had made findings explaining the connection of mere intrastate possession of machineguns to interstate commerce, or if there were an expressly required nexus between such possession and commerce,[25] § 922(*o*) might be vindicated under the second *Lopez* prong. These features are lacking. Whatever the effect a single intrastate possession of a machinegun has on economic activity in firearms, the text and legislative history of § 922(*o*) do not support any conclusion that Congress considered such effects or viewed § 922(*o*) as part of a comprehensive approach to federal regulation of commerce in machineguns. As discussed previously, § 922(*o*) was inserted into FOPA with virtually no discussion of its content and with absolutely no discussion of its place in the broad scheme of federal firearms regulations. *See supra* part II.A. Like § 922(q) found unconstitutional in *Lopez,* no Congressional findings attest that § 922(*o*) is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1631. No studies, testimony or evidence of any other sort – Congressional or otherwise – is adduced in favor of § 922(*o*). Nor does § 922(*o*) contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at ___, 115 S.Ct. at 1631. To infer in the face of this void that regulation of intrastate possession is essential to effectively regulate interstate traffic in machineguns states a naked conclusion, a fiat without supporting facts. Congress has not helped us to discern a connection between the possession ban and interstate commerce which is otherwise invisible to the naked eye. *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1632.

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[25] We are not at liberty to question the Supreme Court's approval of the predecessor statute to 18 U.S.C. § 922(g)(1), which criminalizes possession of a firearm by a felon "in or affecting commerce." Only a minimal jurisdictional nexus is required, i.e. that at some time the firearm had travelled in interstate commerce. *Scarborough v. United States*, 431 U.S. 563, 575, 97 S.Ct. 1963, 1969, 52 L.Ed.2d 582 (1977). As this broad reading of the Commerce Clause has Supreme Court inprimatur, albeit pre-*Lopez*, we can only note the tension between the two decisions and will continue to enforce § 922(g)(1). *See United States v. Rawls*, 85 F.3d 240, 243 (5th Cir.1996) (Garwood, J., specially concurring).

Finally, like § 922(q), § 922(*o*) intrudes upon the traditional police powers of the states and violates *Lopez*'s third mandate for a substantial-effects regulation of intrastate activity because it affords no logical demarcation between the national and local interests. *Brecht v. Abrahamson,* 507 U.S. 619, 635, 113 S.Ct. 1710, 1720, 123 L.Ed.2d 353 (1993) (states have primary authority for defining and enforcing criminal law); *see Lopez,* ___ U.S. at ___ n. 3, 115 S.Ct. at 1631 n. 3; *Bass,* 404 U.S. at 349-50, 92 S.Ct. at 523-24. Section 922(*o*) would punish a local resident for the mere possession of a machinegun acquired after 1986 with "no requirement that his possession of the [machinegun] have any concrete tie to interstate commerce." *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1634. The Supreme Court avoided such a result in *Bass. Bass,* 404 U.S. at 349-50, 92 S.Ct. at 523-24. To uphold § 922(*o*), a purely criminal law, with no nexus to interstate commerce, whose enforcement intrudes upon traditional police powers of the states, would convert the commerce power into a reserved "general federal police power." *Id.* at ___ - ___, 115 S.Ct. at 1632-33; *see also id.* at ___, 115 S.Ct. at 1638 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."). The rationale that Congress can, on a blank slate, criminalize possession under the interstate Commerce Clause in order to regulate "the demand side of the market" can be applied to the possession of anything. Following *Lopez,* § 922(*o*) cannot be upheld as a regulation which substantially affects interstate commerce.

CONCLUSION

Regardless of one's view of the wisdom of banning the private possession of machineguns, the question before this court is whether the Commerce Clause grants Congress the authority to ban private, intrastate possession of a machinegun with no showing that the prohibition is connected in any way to interstate commerce or is part of a broader federal regulatory scheme. Congress's commerce powers are broad, reaching even Roscoe Filburn's wheat field in Ohio. *Wickard v. Filburn,* 317 U.S.

111, 63 S.Ct. 82, 87 L.Ed. 122 (1942). *Lopez,* however, closely controls this case. *Lopez* does not permit Congress, acting pursuant to the Commerce Clause, to criminalize the mere intrastate possession of machineguns without some indication that the possession ban is necessary to the regulation of, or has some other substantial tie to, interstate commerce. Section 922(*o*)'s ban on the mere possession of a machinegun exceeds Congress's authority under the Commerce Clause.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

William J. KIRK, Defendant-Appellant.

No. 94-50472.

United States Court of Appeals,
Fifth Circuit.

Nov. 7, 1995.

Defendant was convicted pursuant to his conditional plea of guilty before the United States District Court for the Western District of Texas, Sam Sparks, J., of one count of unlawful possession of machine gun. Defendant appealed. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) evidence supported determination that government did not promise to forego further prosecution if defendant were successful on appeal attacking validity of another statute under which he had earlier entered guilty plea; (2) double jeopardy did not bar prosecution after government agreed to dismiss original prosecution because of perceived infirmity in statute; (3) statute prohibiting transfer or possession of machine guns did not exceed Congress' power under commerce clause; and (4) two-level enhancement for obstructing justice was properly imposed for defendant's conduct in urging witness not to cooperate with government regarding second charge contained in same indictment.

Affirmed.

Edith H. Jones, Circuit Judge, filed dissenting opinion.

E.G. Morris, Morris & Florey, Austin, TX, for appellant.

Mark R. Stelmach, Richard L. Durbin, Jr., Asst. U.S. Attys., James H. DeAtley, Acting U.S. Atty., San Antonio, TX, for appellee.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, and JONES and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

The appellant, William J. Kirk, entered a conditional guilty plea in the district court to one count of unlawful possession of a machinegun under 18 U.S.C. § 922(*o*).[1] On appeal, Kirk challenges the indictment and the district court's sentence calculation. Finding no error, we affirm.

I. FACTS

On September 1, 1988, Kirk offered to sell a machinegun to Donald Mueller. From September 1988 through January 4, 1989, Kirk attempted to sell various unregistered machineguns to Mueller. On January 4, 1989, Kirk agreed to sell Mueller an M-16 machinegun for $1,200.00. Mueller then went with Kirk to a rifle range in

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[1] "Machinegun" is defined in 26 U.S.C. § 5845(b) as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."

Dripping Springs, Texas where they obtained certain parts necessary for a machinegun conversion. Kirk used the parts to convert a semi-automatic EA Company Rifle, .223 caliber, model J-15, to a machinegun. Kirk and Mueller test-fired the converted machinegun with blank ammunition, and the transaction was completed.

On February 12, 1989, Kirk made arrangements with Mueller to sell him an UZI machinegun for $1,100.00 in cash plus a $900.00 commercial welder. On February 21, 1989, at the same rifle range, the cash and welder were exchanged for an Action Arms Limited UZI carbine, Model A, 9 millimeter bearing serial number SA32084, which had been converted to a machinegun by the addition of an UZI machine bolt. Mueller test-fired the UZI in the fully automatic mode. John M. Clark accompanied Mueller on February 21 and witnessed the transaction. Apparently, through Mueller's cooperation, a number of the meetings and conversations between Kirk and Mueller were monitored by the Bureau of Alcohol, Tobacco and Firearms.

Kirk was arrested November 28, 1989. He was charged with firearms violations in eight counts of a ten-count superseding indictment. On the day trial was scheduled, Kirk pled guilty to one count, charging unlawful possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). Kirk appealed his conviction, arguing that section 5861 had been implicitly repealed by the passage of 18 U.S.C. § 922(*o*). Based on authority from other circuits supporting Kirk's argument, the parties jointly moved to remand the case to the district court for dismissal of the conviction under Rule 48(a) of the Federal Rules of Criminal Procedure.[2]

After the first conviction was set aside, Kirk was charged on December 21, 1993 in a four-count indictment with violations of 18 U.S.C. § 922(*o*); unlawful possession of a machinegun on January 4, 1989 (Count One); unlawful transfer of a machinegun on January 4, 1989 (Count Two); unlawful possession of a machinegun on February 21, 1989 (Count Three); and unlawful transfer of a machinegun on February 21, 1989 (Count Four). Kirk filed a motion to dismiss the indictment, arguing that section 922(*o*) was unconstitutional because it exceeded the power of the federal government under the Commerce Clause and because the indictment failed to allege a connection with interstate commerce. Kirk also challenged his prosecution on the basis of the plea agreement entered in the first prosecution and on the basis of double jeopardy. The district court overruled these contentions. Kirk entered a conditional guilty plea to count one of the indictment, preserving the right to appeal the district court's rulings.

Kirk was sentenced on June 24, 1994. In calculating Kirk's sentencing range under the sentencing guidelines, the district court increased the defendant's offense level for obstruction of justice. The district court sentenced Kirk to a term of imprisonment of twelve months and one day, a term of supervised release of three years, a fine of

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[2] FED.R.CRIM.P. 48(a) provides, in relevant part, "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate."

$3,000.00 and a special assessment. The defendant timely filed this appeal.

II. DISCUSSION

A.

Kirk first contends that the district court erred in denying his motion for specific performance of his prior plea agreement. Kirk claims that as part of the first plea agreement in 1991, the government promised that if Kirk were successful on appeal, it would not bring a subsequent prosecution based on the same conduct. Thus, Kirk argues, the subsequent prosecution was barred by that prior agreement.

If a plea agreement exists, and a plea of guilty has been in some way induced by a promise, it is essential to the fairness of the proceeding that the promise be fulfilled. *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). This circuit requires the government to strictly comply with the agreements it makes with defendants. *United States v. Chagra,* 957 F.2d 192, 194 (5th Cir.1992). A court's inquiry regarding whether a particular promise induced a guilty plea does not necessarily end with a reading of the written agreement. Evidence of discussions surrounding the negotiations of the written agreement may establish the existence of a promise. *United States v. Williams,* 809 F.2d 1072, 1079 (5th Cir.1987), *cert. denied,* 484 U.S. 896, 108 S.Ct. 228, 98 L.Ed.2d 187 (1987). We will reverse a district court's findings in this regard only if clearly erroneous. *Id.*

At a hearing in the district court, Kirk testified that at the time he was deciding to plead guilty in 1991, the assistant U.S. attorney told him that he could appeal his conviction based on the constitutionality of the statute, and that if he was successful the government would not bother him any more. However, the AUSA, Gerald Carruth, testified that there was no agreement not to pursue other charges if the conviction did not stand up. In fact, Carruth testified that at no time did the government agree to "give up" if Kirk's appeal was successful.

The written plea agreement presented in January 1991 contained only the agreement to dismiss the other charges at sentencing and the standard language regarding the government's right to proceed with prosecution should the defendant withdraw his guilty plea prior to sentencing. The written agreement contained no promise not to re-prosecute in the event Kirk's appeal was successful. The record on appeal also reveals that at the plea hearing held January 23, 1991, after the plea agreement was presented to the district court, the court inquired "Has anyone made any promise to you other than the plea agreement that induced you to plead guilty?" The defendant responded "No, sir."

The district court found, based on the evidence presented, that the defendant entered into the first plea agreement because of the strength of the evidence against him, including recorded conversations, and not because of any promise not to prosecute in case of a successful appeal. In addition, the district court found that the defendant had not established by a preponderance of the evidence that AUSA Carruth made the alleged promise. This finding was based on the testimony of the defendant and the attorneys involved and necessarily depended on an evaluation of credibility by the district court.

"It is not this Court's function to pass on a district court's determination regarding the credibility of witnesses." *United States v. Alaniz-Alaniz,* 38 F.3d 788, 791 (5th Cir.1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 1412, 131 L.Ed.2d 297 (1995). Given the testimony of the parties, there were two permissible views of the evidence. The district court chose one view based on its ability to weigh the evidence and evaluate the credibility of the witnesses. Under these circumstances, we cannot hold that the district court's findings are clearly erroneous.

B.

The appellant next argues that his prosecution under section 922(*o*) violated his rights under the Double Jeopardy Clause of the Fifth Amendment because he had been placed in jeopardy for the same conduct in the previous prosecution under 26 U.S.C. § 5861(d). As noted above, the instant prosecution under section 922(*o*) was not commenced until after the prosecution under 26 U.S.C. § 5861(d) was dismissed because of a perceived infirmity.[3]

The Double Jeopardy Clause provides that no person shall "be twice put in jeopardy of life or limb" for the "same offence." U.S. CONST. amend. V.

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[3] The government decided the initial prosecution should be dismissed based on the Tenth Circuit's holding in *United States v. Dalton,* 960 F.2d 121 (10th Cir.1992) that the enactment of 18 U.S.C. § 922(*o*) implicitly repealed 26 U.S.C. § 5861(d). This Court subsequently disagreed with the Tenth Circuit on this question in *United States v. Ardoin,* 19 F.3d 177 (5th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 327, 130 L.Ed.2d 287 (1994).

> It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to the conviction.

Lockhart v. Nelson, 488 U.S. 33, 38, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). The exception to this rule, not applicable in this case, is that if the defendant succeeds in having his first conviction set aside on the ground that the evidence presented was insufficient, a re-prosecution is barred because the defendant was entitled to an acquittal at the first trial. *Lockhart*, 488 U.S. at 39, 109 S.Ct. at 290; *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

The first prosecution in the present case was set aside not by a court's determination that there was error, but by agreement of the parties that, according to persuasive authority, the statute under which Kirk was convicted had been implicitly repealed. This is the type of trial error to which the general rule of *Lockhart* applies. It makes no difference that this Court's review of the first conviction was preempted by motion of the government under Rule 48 of the Federal Rules of Criminal Procedure. Thus, the prosecution of Kirk under 18 U.S.C. § 922(*o*), after a prosecution dismissed for a perceived "defect in the charging instrument," does not offend the Double

Jeopardy Clause. *See Montana v. Hall,* 481 U.S. 400, 403, 107 S.Ct. 1825, 1827, 95 L.Ed.2d 354 (1987).[4]

C.

Kirk also challenges his conviction on the ground that 18 U.S.C. § 922(*o*) is unconstitutional. Section 922(*o*) provides, in relevant part,

> (*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to –
>
> * * *
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

The effective date of this provision was May 19, 1986. Kirk contends that this section is unconstitutional because it is beyond the authority granted to Congress under the Commerce Clause. We must analyze this contention in light of the Supreme Court's recent pronouncement in *United States v. Lopez,* ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).[5]

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[4] On this point, we agree with the Tenth Circuit. *See United States v. Dalton,* 990 F.2d 1166 (10th Cir.), *cert. denied,* ___ U.S. ___, 114 S.Ct. 253, 126 L.Ed.2d 205 (1993).

[5] In addition, to the extent not inconsistent with the Supreme Court's pronouncement, we are bound by our opinion in *Lopez* as the law of the circuit. *United States v. Lopez,* 2 F.3d 1342 (5th Cir.1993).

In *Lopez,* the Supreme Court addressed the constitutionality of the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q). Section 922(q) made it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Supreme Court affirmed this Court's ruling that section 922(q) was beyond the scope of the Commerce power, and thus was unconstitutional.

In evaluating section 922(q)'s constitutionality, the Supreme Court described three categories of activity which Congress could regulate under the Commerce Clause:[6] (1) the use of the channels of interstate commerce; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) activities which have "a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce." *Lopez,* ___ U.S. at ___-___, 115 S.Ct. at 1629-30. The Court held that section 922(q) did not fall within the first two categories because it did not regulate the channels or instrumentalities of interstate commerce. Thus, the Court evaluated section 922(q) under the third category to determine whether it was a regulation of an activity that substantially affected interstate commerce.

The Supreme Court held that section 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.*, ___ U.S. at ___-___, 115 S.Ct. at 1630-31. The Court also held that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.*, ___ U.S. at ___, 115 S.Ct. at 1634. Thus, the Court found section 922(q) unconstitutional under the Commerce Clause.

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[6] "The Constitution delegates to Congress the power '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' " *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1626.

Although *Lopez* is instructive regarding the proper Commerce Clause analysis, it does not control the result in our analysis of section 922(*o*). We are not the first court to address section 922(*o*) in light of *Lopez*. In this regard, we have the benefit of the Tenth Circuit's opinion in *United States v. Wilks,* 58 F.3d 1518 (10th Cir.1995). The *Wilks* court held that "unlike § 922(q), § 922(*o*) embodies a proper exercise of Congress' power to regulate 'things in interstate commerce' – i.e., machineguns." *Id.* at 1521. "The interstate flow of machineguns," the court said, " 'not only has a substantial effect on interstate commerce; it is interstate commerce.' " *Id.* (quoting *United States v. Hunter,* 843 F.Supp. 235, 249 (E.D.Mich.1994)). We agree.

It is particularly important to our determination that section 922(*o*) prohibits the private possession or transfer of machineguns only if they were not lawfully possessed prior to May 19, 1986. 18 U.S.C. § 922(*o*). Thus, transfer or possession of a machinegun is unlawful under this section only if it was manufactured or illegally transferred after May 19, 1986. It is clear, therefore, that the activity Congress intended to prohibit by application of section 922(*o*) was the introduction into the stream of commerce machineguns manufactured, imported, or otherwise illegally obtained, after the effective date of the act. When read as a whole, it is plain that the activities prohibited by section 922(*o*) constitute commerce.[7] We recognized the difference between this regulation and the Gun Free School Zones Act in our opinion in *United States v. Lopez*, 2 F.3d 1342 (5th Cir.1993):

> Section 922(*o*) is restricted to a narrow class of highly destructive, sophisticated weapons that

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[7] The dissent contends that we have misconstrued the plain language of the statute in coming to this conclusion. Rather than considering the scope of the prohibition in section 922(*o*), the dissent prefers to discuss mere *possession* in a vacuum. The dissent attempts to justify its narrow perspective by noting that the offense of conviction implicated only unlawful possession, an offense distinct from unlawful transfer thanks to a disjunctive connector. The true indicator of the statute's scope, however, is found not in subsection (1), but in subsection (2) which excludes certain transfers and possessions from the prohibitions found in subsection (1).

Following the dissent's approach, viewing similar prohibitions against mere possession in isolation, we would be required to strike down other federal criminal statutes that thus far have been upheld. See, for example, 21 U.S.C. § 844(a) (prohibiting simple possession of controlled substances in context of broader prohibitions against manufacture or distribution of same in the Drug Abuse Prevention and Control Act); 21 U.S.C. § 843(a)(5) (prohibiting possession of equipment designed to mark or label counterfeit drugs in context of prohibition against making or distributing same); 18 U.S.C. § 2342(a) (prohibiting possession of contraband cigarettes in context of broader prohibition against commercial transfer of same). See also 18 U.S.C. § 842(j) (prohibiting "mere" storage of any explosive material in a manner not conforming to federal regulations in context of federal restrictions on manufacture, import, purchase, and distribution of same).

> have been either manufactured or imported *after* enactment of the Firearms Owners Protection Act, which is more suggestive of a nexus to or affect on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within one thousand feet of the grounds of any school.

2 F.3d at 1356 (emphasis in original; footnote omitted).

Defendant Kirk attempts to avoid section 922(*o*)'s relation to interstate commerce by characterizing the alleged "crime" in this case as "mere possession" of a machinegun.[8] At the same time, however, Kirk challenges the constitutionality of section 922(*o*) on its face. In evaluating this type of challenge, we must necessarily consider the scope of section 922(*o*). As noted above, the "possession" prohibited by section 922(*o*) is limited to possession of machineguns not lawfully possessed before the effective date of the act. To put it simply, there could be no unlawful possession under section 922(*o*) without an unlawful transfer. In this context, the limited ban on possession of machineguns must be seen as a necessary and proper measure meant to allow law enforcement to detect illegal transfers where the banned commodity has come to rest: in the receiver's possession. In effect, the ban on such possession is an attempt to control the interstate market for machineguns by creating criminal liability for those who would constitute the demand-side of the market, i.e., those who would facilitate illegal transfer out of the desire to acquire *mere possession*.

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[8] The offense to which Kirk pled guilty was unlawful "possession" of a machinegun in violation of 18 U.S.C. § 922(*o*). The counts charging Kirk with unlawful "transfer" were dismissed pursuant to Kirk's plea bargain.

Thus, section 922(*o*) falls into the first category identified by the Supreme Court in *Lopez:* a regulation of the use of the channels of interstate commerce. In other words, section 922(*o*) is a regulation which attempts "to prohibit the interstate transportation of a commodity through the channels of commerce." ___ U.S. at ___, 115 S.Ct. at 1630. This type of regulation is within the commerce power even though, admittedly, some of the activity made unlawful is purely intrastate. As with federal regulation of controlled substances, *see* 21 U.S.C. § 801, *et seq.*, there is a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession is essential to effective control of the interstate incidents of such traffic. Therefore, we hold that the prohibition of transfer *or possession* of post-1986 machineguns in 18 U.S.C. § 922(*o*) is a rational exercise of the authority granted Congress under the Commerce Clause.[9]

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[9] Kirk also argues that his conviction cannot be valid under the Commerce Clause because section 922(*o*) does not require a showing that a particular unlawful possession substantially affects interstate commerce. However, where, as here, Congress has the power to regulate a particular class of activity because of its relation to interstate commerce, there is no requirement that a substantial effect be shown in each particular case. *See United States v. Nelson*, 458 F.2d 556 (5th Cir.1972). Because of our holding above we need not address this argument further.

D.

Finally, with regard to his sentence, Kirk argues that the district court erred in applying the enhancement for obstruction of justice under section 3C1.1 of the federal sentencing guidelines. That section provides

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

United States Sentencing Commission, Guidelines Manual, § 3C1.1 (Nov. 1994).[10] Kirk contends that the conduct for which the two level increase was imposed was not related to the "instant offense" as required by this Guideline.

According to the Presentence Investigation Report, Kirk contacted John M. Clark after a search warrant was executed at Kirk's place of business but before he was indicted or arrested. Clark was present on February 21, 1989, when Kirk converted an UZI carbine from semiautomatic to fully automatic and test-fired the weapon at the rifle range. Kirk instructed Clark not to cooperate with authorities concerning his knowledge of these events. The offense to which Kirk pled guilty involved possession of a machinegun on January 4, 1989. Kirk argues that because Clark's knowledge of Kirk's activities did not relate specifically to this event, his attempted obstruction did not relate to the offense of conviction, and therefore did not relate to the "instant offense" as required by section 3C1.1.

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[10] Because of the dates of Kirk's offense conduct, and because of *ex post facto* considerations, the 1988 edition of the Guidelines Manual was used in this case. However, the text of section 3C1.1 as currently written does not differ in any material respect from the version applied in this case.

Kirk cites three decisions from other circuits that support his position. *See United States v. Bagwell*, 30 F.3d 1454 (11th Cir.1994); *United States v. Woods*, 24 F.3d 514 (3d Cir.1994); *United States v. Perdomo*, 927 F.2d 111 (2d Cir.1991). However, after a careful reading of section 3C1.1, we must respectfully disagree with these decisions. Instead, we find the reasoning of the Sixth Circuit persuasive.

In *United States v. Crousore*, 1 F.3d 382 (6th Cir.1993), the court addressed the same argument Kirk presents in the present case. In rejecting the defendant's argument, the court said

> This guideline [Sec. 3C1.1] applies to conduct during the investigation, prosecution, and sentencing of the instant offense, i.e., the offense for which the defendant is being sentenced under the Guidelines.
>
> * * *
>
> Whether [the defendant's] lie was about his guilt on the specific charges to which he pleaded guilty is not an issue under § 3C1.1.
>
> * * *
>
> Therefore, the test is not whether the false statement [obstruction] was about the actual crime charged, but whether it was made during the investigation, prosecution, or sentencing of the "instant offense."

1 F.3d at 385. The court also noted that an attempt to conceal trivial or immaterial information would not warrant the obstruction enhancement. "Material information is information that, if believed, would tend to influence or affect the issue under determination." *Id.*

We agree with the Sixth Circuit. The enhancement for obstruction of justice under section 3C1.1 is proper anytime the defendant has concealed or attempted to conceal information material to the investigation, prosecution, or sentencing of the instant offense. Although this Guideline clearly contemplates a relationship between the information concealed and the offense conduct, it does not require that it be related directly to a particular offense to which the defendant pleads guilty. To hold otherwise would make the sentencing court's ability to consider obstructive behavior dependent on the offense in a multiple-count indictment the parties choose to make the subject of a plea bargain.

It is clear in the present case that at the time Kirk solicited Clark's aid in impeding the government's investigation, Clark's personal knowledge of the events on February 21, 1989 were material to the investigation and prosecution of the firearms offenses on which Kirk was ultimately indicted. The "instant offense" was one of those offenses. Thus, the district court's application of the 3C1.1 enhancement was not error.

III. CONCLUSION

For the foregoing reasons, the appellant's conviction and sentence are AFFIRMED.

EDITH H. JONES, Circuit Judge, dissenting.

The United States Supreme Court returned federalism to constitutional doctrine in recently deciding, in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), that Congress exceeded its power under the Commerce Clause when it banned the possession of firearms near a school. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp II). This case poses remarkably similar constitutional questions arising from 15 U.S.C. § 922(*o*), a companion provision to Section 922(q). Appellant Kirk contends that the Court's reasoning in *Lopez* also renders unconstitutional Congress's attempt, in Section 922(*o*), to ban[1] possession of any "machine gun"[2] that was not

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[1] One commentator, writing shortly after Section 922(*o*) was passed as part of the Firearms Owners' Protection Act, Pub.L. No. 99-308, 100 Stat. 449 (1986), declined to characterize this Section as a "ban" on machine gun possession, noting that possession of machine guns was still permitted "under the authority" of the United States or any lesser political subdivision or as a result of the grandfather clause for weapons "lawfully" possessed before 1986. Hardy, David T., The Firearms Owners' Protection Act: A Historical and Legal Perspective, 17 Cumberland L.Rev. 585, 668-670 (1987). Hardy, however, advocated a narrower construction of the statute than has been utilized by the government here; the government construes Section 922(*o*) to ban private possession of machine guns produced or unlawfully transferred after 1986.

[2] The term "machine gun" is defined for federal regulatory purposes in 26 U.S.C. § 5845(b). As this court's *en banc* opinion found, however, not all machine guns so defined are Uzis or AK-47's. They include conventional firearms that have been modified or altered by wear and tear to commence "firing when the trigger is depressed and continue[ ] firing until it is released, or the weapon's supply of ammunition is exhausted." *United States v. Anderson*, 885 F.2d 1248, 1249, n. 3 (5th Cir.1989).

"lawfully" possessed before the provision passed in 1986. Acknowledging that *Lopez* does not control this case, I nevertheless see no meaningful distinction between Section 922(q) and Section 922(*o*) as the latter applies to possession, not transfer, of machine guns. I also believe that Section 922(*o*) cannot be upheld as a more direct exercise of Congressional commerce power. I therefore respectfully dissent.

The majority have accurately described *Lopez*'s recapitulation of the jurisprudence of the Commerce Clause. Thus, it is settled that the Congressional power over interstate commerce extends to (1) regulating the use of channels of interstate commerce; (2) regulating and protecting the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) regulating intrastate activities that have a substantial effect on interstate commerce. ___ U.S. at ___, 115 S.Ct. at 1629-30.

But while *Lopez* evaluated the ban of firearms near a school under the "affecting commerce" strand of jurisprudence, the majority here have concluded that the ban on possession of machine guns constitutes either a regulation of the "channels of interstate commerce or of things moving in interstate commerce." This analysis, in my view, misinterprets those two broad categories of Commerce Clause power and ultimately conflates them with the third. Moreover, the affecting commerce category, relied upon by the federal government's brief to this court, cannot sustain Section 922(*o*) under the logic of *Lopez*.

The fundamental mistake by the majority lies in their misconstruction of the plain language of the statute. Although the majority deem the ban on possession of "machine guns" to regulate the channels of interstate commerce or things in interstate commerce, neither Section 922(*o*) nor its legislative history supports that position. The statute is not limited to possession in or even affecting interstate commerce or to possession of a firearm that has traveled in interstate commerce. Rather, it criminalizes the mere private possession of a machine gun.

The majority infer from the fact that Section 922(*o*) prohibits "transfer" as well as "possession" that channels or things in interstate commerce were intended to be regulated. This inference seems unwarranted for two reasons. First, transfer as well as possession of a thing can be of a wholly intrastate character. Second, when the government criminalizes conduct in the disjunctive, it may prosecute separately each type of conduct disjunctively named. Thus, as in this case, possession alone is criminalized independent of any transfer of a machine gun. We need not and ought not consider here the constitutionality of the Section 922(*o*) restriction on transfers of machine guns.

The majority also seek advantage from the nature of the weapons banned and the statute's prospective scope, citing a passage from this court's decision in *Lopez*:

> Section 922(*o*) is restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported *after* enactment of the Firearms Owners Protection Act, which is more suggestive of a nexus to or

> effect on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within 1,000 feet of the grounds of any school.

2 F.3d at 1556 (emphasis in original, footnote omitted). Neither of these features of the law, however, renders it more closely or more necessarily connected to the regulation of interstate commerce. Congress's power to regulate interstate commerce does not depend on the value or dangerousness of the item regulated, but upon its connection with interstate commerce. Obviously, eggs as well as toxic chemicals can be regulated if they have the appropriate nexus to interstate commerce. Further, the grandfather clause of the ban, making it effective only after 1986, fails to enhance its relation to interstate commerce.[3] After 1986, both interstate and wholly intrastate private possessions are banned, and there are no Congressional findings that this most drastic impact upon intrastate activity, otherwise subject to local police power, was required by the ineffectiveness of prior federal machine gun regulation. Section 922(*o*), in sum, does not expressly or by necessary implication appertain to the channels of interstate commerce or to regulation of things in interstate commerce.

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[3] The effect of the grandfather clause does, paradoxically, assure a nexus between interstate commerce and criminal possession of pre-1986 *unlawfully* possessed machine guns, because, as this court's *Lopez* opinion noted, pre-1986 regulatory laws expressly embodied a jurisdictional nexus to commerce. *See Lopez*, 2 F.3d at 1356, n. 29.

Because Section 922(*o*) reaches wholly intrastate, noncommercial possession, the provision poses the constitutional question avoided by the Supreme Court when it interpreted a federal statute criminalizing a felon's possession of a firearm. 18 U.S.C. § 1202(a); *United States v. Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). The government prosecuted appellant Bass without demonstrating any connection between his possession and interstate commerce, because the statute did not clearly require a nexus. Noting the ambiguity of the [sic] both the statute and legislative history concerning whether interstate commerce was jurisdictionally invoked, the Court declined to accept broad construction of the statute and "render[ ] traditionally local criminal conduct a matter for federal enforcement and . . . [promote] a substantial extension of federal police resources." 404 U.S. at 351, 92 S.Ct. at 524. By inferring a requirement that the possession be "in commerce or affecting commerce," the Court avoided a significant intrusion on the traditional federal-state balance. 404 U.S. at 350, 92 S.Ct. at 523. A more far-reaching intrusion on state police power is carried out by Section 922(*o*), but unlike *Bass,* no saving construction is available.

The majority do not rely on legislative history concerning Section 922(*o*), for there is virtually none, and it says nothing about interstate commerce. There appears to be only one recorded statement by its legislative sponsor, Representative Hughes, in the Congressional Record:

> I do not know why anyone would object to the banning of machine guns.

132 Cong.Rec. H1750 (April 10, 1986) (statement of Rep. Hughes). Section 922(*o*) was incorporated as Section 102(9) of the Firearms Owners' Protection Act, 100 Stat. 452-53, but no other reference to it appears in the committee reports or elsewhere in legislative history, with the exception of a brief Senate colloquy concerning the scope of the exemption for government-authorized machine guns.[4]

Despite the absence of textual or legislative historical support for their interpretation, the majority conclude that Section 922(*o*) "is an attempt to control the interstate market for machine guns by creating criminal liability for those who would constitute the demand-side of the market . . . ". Accordingly, the majority first upholds the possession ban as a regulation of the use of channels of interstate commerce. I respectfully disagree. Even accepting the majority's cause-and-effect rationale, mere intrastate possession of a machine gun is not a *use of the channels* of interstate commerce any more than mere intrastate possession of a basketball. *Compare Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 257, 85 S.Ct. 348, 357-58, 13 L.Ed.2d 258 (1964).

The majority also rely upon a recent Tenth Circuit case that upheld Section 922(*o*) as a regulation of things in commerce, *i.e.* interstate traffic in machine guns. *U.S. v. Wilks*, 58 F.3d 1518 (10th Cir.1995). Decided after the Supreme Court's decision in *Lopez*, *Wilks* considered the

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[4] *See* discussion of legislative history in Hardy, supra n. 1, at 671-74 and n. 461, 462, 463.

Section 922(*o*) ban on machine gun possession functionally indistinguishable from previous laws, such as the 1968 Gun Control Act, which had extended federal control over interstate and foreign commerce by regulating all persons engaged in the business of importing, manufacturing, or dealing in firearms. *Wilks*, 58 F.3d at 1521-22. The court used the statements of Congressional findings and purposes in the previous laws to defend Congress's further step of banning private machine gun possession in Section 922(*o*) as if it were a part of the seamless web of regulation of the firearms business.[5] For several reasons, I must disagree with *Wilks*. First, none of those laws purported to ban possession of firearms unrelated to interstate commerce. *Compare United States v. Bass, supra.* As Judge Garwood's opinion in *Lopez* painstakingly demonstrates, all previous federal gun control laws have been expressly tied to the conduct of the firearms business, a business whose inter- and intra-state activities are not only commingled but clearly "commercial". *See Lopez*, 2 F.3d at 1348-57.

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[5] *Wilks* abandoned, as it had to, the erroneous references to legislative history on which pre-*Lopez* opinions of the Eighth and Ninth Circuits relied in upholding Section 922(*o*). *See United States v. Hale*, 978 F.2d 1016, 1018 (8th Cir.1992), *cert. denied*, 507 U.S. 997, 113 S.Ct. 1614, 123 L.Ed.2d 174 (1993); *United States v. Evans*, 928 F.2d 858 (9th Cir.1991). These cases drew a connection between Section 922(*o*) and interstate commerce based upon legislative history from earlier, unpassed legislation. This court criticized such reliance in *United States v. Lopez*, 2 F.3d at 1356-57; the Supreme Court's decision in *Lopez* undermined other aspects of those courts' reasoning; and *Wilks* appropriately discards the discredited reasoning.

Second, the overall structure and history of the Firearms Owners' Protection Act (FOPA), in which Section 922(*o*) originated, suggests no general Congressional determination that possession of machine guns necessarily implicates interstate commerce. Judge Garwood's opinion in *Lopez* explains that the Act focused on regulating transfers of firearms, including express Congressional findings that transfer by non-federal-licensees to "disqualified persons" must be controlled to prevent evasion of license regulations. *Lopez,* 2 F.3d at 1354-55. Other amendments effected by that statute dealt with provisions which already expressed an interstate commerce nexus without diluting those requirements. *Id.* The preamble of the legislation expressed Congress's desire not to "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the . . . possession or use of firearms appropriate to . . . any lawful activity. . . . " P.L. 99-308 § 100 stat. 449. Section 922(*o*) stands isolated from the rest of the FOPA because it conspicuously lacks either a nexus to commerce or the support of findings that banning mere intrastate possession of machine guns is essential to effectuate federal regulation.

Third, banning the possession of machine guns represents a logical extreme of federal regulation but also the negation of the pre-existing regulatory structure as to those firearms. *Wilks,* however, imports the same Congressional findings that regulated transfers of firearms in interstate commerce to justify banning mere possession without any link to interstate commerce. The *Wilks* decision leaps to fill in the logical gap between regulating activity in interstate commerce and banning a wholly local intrastate action. Surely Congress ought to have decided that its earlier attempts at regulation were ineffectual before taking this intrusive step into the police power of the states. It is not for the courts to do so. Compare *Bass, supra,* where the Court expressed concern that Congress simply did not consider the federalism implications of banning mere intrastate firearm possession.

Although *Wilks*'s point is debatable, I am persuaded that prior federal firearms statutes and Congressional findings do not speak to the subject matter of Section 922(*o*) or its relation to interstate commerce. To paraphrase *Lopez,* by banning the wholly intrastate possession of machine guns, Section 922(*o*) plows new ground and breaks with the longstanding pattern of federal firearms legislation. ___ U.S. ___, 115 S.Ct. at 1632, citing *U.S. v. Lopez,* 2 F.3d at 1366.

Eliminating the "channels of commerce" and "things in commerce" bases of Commerce Clause jurisdiction espoused by the majority, Section 922(*o*) may only be justified as a measure that substantially affects interstate commerce. But the analogy between *Lopez* and this case is compelling, so much so that the majority here, like the court in *Wilks,* did not attempt to dispute it.

Like the provision found wanting by the Supreme Court, Section 922(*o*) is also a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Lopez,* ___ U.S. at ___, 115 S.Ct. at 1630-31. Further, Section 922(*o*) has no jurisdictional element to ensure that the prohibited firearm possession affects interstate commerce. *Id.* at ___, 115 S.Ct. at 1631.[6] Indeed, Section 922(*o*) seems to suffer the same infirmities as the broad reading of the former Section 1202 rejected by the Court in *United States v. Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). *See Lopez,* ___ U.S. at ___, 115 S.Ct. at 1631; *Lopez,* 2 F.3d at 1347 ("Were Section 1202 read to punish mere possession without a commerce nexus, the Court argued, it would intrude upon an area of traditional state authority and would push Congress' commerce power to its limit, if not beyond.").

As in *Lopez,* the possession of a machine gun covered by Section 922(*o*), without more, is no more an economic activity that may substantially affect commerce than was the possession of a firearm in a school zone prohibited by Section 922(q). ___ U.S. at ___, 115 S.Ct. at 1634. Section 922(*o*) would punish a local resident for the mere possession of a machine gun acquired after 1986 "with no requirement that his possession of the firearm have any concrete tie to interstate commerce." *Id.* at ___, 115 S.Ct. at 1634. Indeed, it would appear that the arguments proffered in defense of Section 922(*o*) would unalterably convert the commerce power into a reserved "general police power" in direct contravention of the Court's dictates. *Id.* at 1632-33; *see also Id.* at ___, 115 S.Ct. at 1638. As Justice

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[6] The government's brief relies on the legislative history of other firearms statutes that was rejected as a guide to interpreting Section 922(q) in *Lopez. Lopez,* ___ U.S. at ___, 115 S.Ct. at 1632. Based on the Fifth Circuit's reading of the legislative history behind firearms regulation and Section 922(*o*), in accordance with the discussion above, I would reject the use of legislative history of prior firearms legislation in this case.

Kennedy's concurrence in *Lopez* states: "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." ___ U.S. at ___, 115 S.Ct. at 1638.

Regardless of one's view of the wisdom or unwisdom of banning the private, intrastate possession of machine guns, the question before this court is whether Congress had the constitutional authority to do so by virtue of its power to regulate interstate and foreign commerce.[7] *Lopez*

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[7] In footnote 7 of their opinion, the majority conjure up the "horribles" that they believe will ensue if § 922(*o*) is found constitutionally infirm in the wake of *Lopez*. Four statutes they cite as vulnerable are 21 U.S.C. § 844(a), prohibiting simple possession of controlled substances; 21 U.S.C. § 843(a)(5), prohibiting possession of equipment designed to label counterfeit drugs; 18 U.S.C. § 2342(a), prohibiting possession of counterfeit cigarettes; and 18 U.S.C. § 842(j), prohibiting storage of explosive materials not conforming to federal regulations.

Footnote 7 is both mischievous and wrong. It is mischievous because in pure *dictum*, it virtually invites constitutional challenges to legislation not even remotely before the court in this case. It is also mischievous in ignoring the reasoning of *Lopez*, which requires a careful review of *any* individual statute's background and purpose before a constitutional challenge will be upheld.

The footnote is seriously wrong to cast doubt on the constitutionality of the two listed federal drug control laws. In *Lopez*, 2 F.3d at 1367, n. 51, this court rejected the government's proffered analogy between the constitutionality of proscribing § 922(q) firearm possession hear a school and outlawing simple drug possession. As Judge Garwood pointed out, an earlier *Lopez* case, 459 F.2d 949, 952-53 and n. 3 (5th Cir.1972), cited reminds us forcefully that Congress's enumerated power over commerce must have some limits in order to maintain our federal system of government and preserve the states' traditional exercise of the police power. Section 922(*o*) is a purely criminal law, without any nexus to commercial activity,[8] and its enforcement would intrude the federal police power into every village and remote enclave of this vast and diverse nation. Even after *Lopez,* Congress need not do much to satisfy the Commerce

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voluminous Congressional findings, set forth at 21 U.S.C. § 801, to sustain the criminality of simple controlled substance possession as a necessary ingredient of regulating foreign and interstate drug trafficking. This reasoning would also govern the prohibition on possessing equipment to label counterfeit drugs, because Congress expressly recognized that controlled substances, being fungible, cannot effectively be regulated without federal control of local aspects of the business.

The majority's alleged fears with regard to the federal crimes for improper storage of explosives and possession of contraband cigarettes appear to be unwarranted. A cursory review of the legislative history indicates that when Congress decided to regulate explosives, it did so out of concern to protect the channels of interstate commerce and with an express acknowledgement that regulation of intrastate activity was essential to the regulatory scheme. *See, e.g.,* 1970-1 U.S.C.C.A.N. at 1109 (discussing Title XI of P.L. 91-452); and 1970-2 U.S.C.C.A.N. 4007, 4044 (section-by-section analysis of legislation). Similarly, Congress's expressed objective in regulating large-scale traffic in contraband cigarettes was to thwart illicit bootlegging of cigarettes, often conducted by organized crime, from low-tax to high-tax states. 1978-5 U.S.C.C.A.N. 5518 *et seq.* (Sen. report on P.L. 95-575).

[8] This case is obviously different from *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), in which the farmer's use of his privately grown wheat was found to affect the market and "commerce" in that community.

Clause. Here, however, it did practically nothing. I respectfully dissent from the majority's decision upholding the constitutionality of Section 922(*o*).

APPENDIX C

UNITED STATES of America, Plaintiff-Appellee,

v.

William Joseph KIRK, Defendant-Appellant.

No. 94-50472.

United States Court of Appeals,
Fifth Circuit.

March 5, 1996.

E.G. Morris, Morris & Florey, Austin, TX, for Appellant.

Mark R. Stelmach, Richard L. Durbin, Jr., Asst. U.S. Attys., James H. DeAtley, Acting U.S. Atty., San Antonio, TX, for Appellee.

Appeal from the United States District Court for the Western District of Texas; Sam Sparks, Judge.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion November 7, 1995, 5 Cir., 1995, 70 F.3d 791)

Before POLITZ, Chief Judge, and KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

BY THE COURT:

A member of the court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc, IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

(2)

Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

No. 96-1759

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM JOSEPH KIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, authorized Congress to enact 18 U.S.C. 922(*o*), which makes it a federal crime to transfer or possess a machinegun.

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In the Supreme Court of the United States

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No. 96-1759

WILLIAM JOSEPH KIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A51) is reported at 105 F.3d 997. The opinion of the court of appeals panel (Pet. App. A52-A81) is reported at 70 F.3d 791.

JURISDICTION

The en banc court of appeals entered its judgment on February 3, 1997. The petition for a writ of certiorari was filed on May 5, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following entry of a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted on one count of possessing a machinegun, in violation of 18 U.S.C. 922(*o*). He was sentenced to one year and one day's imprisonment, three years' supervised release, and a $3,000 fine. A panel of the court of appeals affirmed. Pet. App. A52-A81. The full court subsequently granted rehearing en banc. *Id.* at A82-A83. The court of appeals, sitting en banc, affirmed the conviction and sentence by an equally divided vote. *Id.* at A1-A51.

1. In January and February of 1989, petitioner sold two machineguns to a private citizen. He was indicted on two counts of possessing a machinegun, and two counts of transferring a machinegun, in violation of 18 U.S.C. 922(*o*). Section 922(*o*) generally provides that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. 922(*o*)(1).[1] Petitioner moved to dismiss the indictment on the ground that Section 922(*o*) exceeds Congress's authority under the Commerce Clause. The district court denied the motion, and petitioner entered a conditional guilty plea (see Fed. R. Crim. P. 11(a)(2)) to one of the possession counts, preserving the constitutional issue for appeal. See Pet. App. A53-A55.

2. A divided panel of the court of appeals affirmed. Pet. App. A52-A81. Petitioner contended, *inter alia*,

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[1] The statutory prohibition does not apply, however, to the transfer or possession of machineguns by federal, state, or local governmental agencies, 18 U.S.C. 922(*o*)(2)(A), or to the "lawful transfer or lawful possession of a machinegun that was lawfully possessed before" the statute's effective date, 18 U.S.C. 922(*o*)(2)(B).

that Section 922(*o*) "is unconstitutional because it is beyond the authority granted to Congress under the Commerce Clause." Pet. App. A60. Petitioner relied on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), which made it a federal crime to possess a gun within 1,000 feet of a school. See Pet. App. A61.

The court of appeals concluded that *Lopez* "does not control the result in our analysis of section 922(*o*)." Pet. App. A62. The court explained that

> the activity Congress intended to prohibit by application of section 922(*o*) was the introduction into the stream of commerce [of] machineguns manufactured, imported, or otherwise illegally obtained, after the effective date of the act. When read as a whole, it is plain that the activities prohibited by section 922(*o*) constitute commerce.

Id. at A62-A63. The court of appeals characterized Section 922(*o*)'s ban on the possession of machineguns as "an attempt to control the interstate market for machineguns by creating criminal liability for those who would constitute the demand-side of the market." *Id.* at A64-A65. "As with federal regulation of controlled substances," the court explained, "there is a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession is essential to effective control of the interstate incidents of * * * traffic" in machineguns. *Id.* at A65. The court therefore concluded that Section 922(*o*) "is a rational exercise of the authority granted Congress under the Commerce Clause." *Ibid.*

Judge Jones dissented. Pet. App. A69-A81. She found "no meaningful distinction between Section

922(q) and Section 922(*o*) as the latter applies to possession, not transfer, of machineguns." Pet. App. A70. Judge Jones also concluded that "Section 922(*o*) cannot be upheld as a more direct exercise of Congressional commerce power." *Ibid.*

3. The full court of appeals subsequently granted rehearing en banc. Pet. App. A82-A83. On rehearing en banc, petitioner's conviction was affirmed by an equally divided court. *Id.* at A1-A51. Judge Parker, joined by seven other judges, voted to affirm the conviction, explaining that "Congress had a rational basis for concluding that the manufacture, transfer and possession of machineguns substantially affect commerce and § 922(*o*) therefore is constitutional." *Id.* at A3.[2] Judge Jones, joined by seven other judges, concluded that "§ 922(*o*) seems a clone of § 922(q), the provision[] struck down in *Lopez*." *Id.* at A32.

ARGUMENT

Petitioner contends (Pet. 4-14) that 18 U.S.C. 922(*o*) exceeds Congress' authority under the Commerce Clause and is therefore unconstitutional. Petitioner principally relies on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), which invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q). Since this Court's decision in *Lopez*, however, the courts of appeals have consistently upheld Section 922(*o*) against constitutional attack. See *United*

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[2] Judge Higginbotham, joined by three other judges (all of whom also joined in Judge Parker's opinion), published a separate concurrence. Pet. App. A3-A21. The concurring opinion asserted that Section 922(*o*) reflects a rational "legislative judgment that possession of machine guns acquired after 1986 has a substantial effect on interstate commerce, particularly by facilitating the trade in illegal drugs." Pet. App. A3.

States v. *Knutson*, 113 F.3d 27, 28-31 (5th Cir. 1997); *United States* v. *Rybar*, 103 F.3d 273, 276-285 (3d Cir. 1996), petition for cert. pending, No. 96-1738; *United States* v. *Beuckelaere*, 91 F.3d 781, 782-787 (6th Cir. 1996); *United States* v. *Kenney*, 91 F.3d 884, 885-891 (7th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948, 951-952 (9th Cir.), cert. denied, 117 S. Ct. 72 (1996); *United States* v. *Wilks*, 58 F.3d 1518, 1519-1521 (10th Cir. 1995). In the absence of a conflict in the circuits, petitioner's constitutional challenge to Section 922(*o*) does not warrant this Court's review.[3]

In *Lopez*, this Court concluded that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Section 922(*o*)'s ban on possession of machineguns, by contrast, is part of a larger prohibition on the possession *or transfer* of a particularly dangerous class of weapons. "[A]t least in most situations," unlawful possession of a machinegun "follows an unlawful transfer." *Rybar*, 103 F.3d at 283. The possession offense defined by Section 922(*o*)—unlike the conduct prohibited by the Gun-Free School Zones Act—is therefore typically linked to a prior unlawful transaction. Because the statutory ban on possession of machineguns is a rational means of effectuating the prohibition on transfers, see Pet. App. A64-A65 (characterizing the ban on possession as "an attempt to control the interstate market for machineguns by creating criminal liability for those who would constitute the demand-side of the market"), it is not akin to the prohibition imposed by Section 922(q).

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[3] Although he concedes that the courts of appeals have uniformly upheld Section 922(*o*), petitioner argues (Pet. 5-6) that there are conflicts in the reasoning of the lower courts' opinions. This Court, however, "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Lab.*, 351 U.S. 292, 297 (1956)).

Petitioner does not contend that Section 922(*o*)'s prohibition on the transfer of machineguns is itself unconstitutional.[4] Any such claim would be unsound. Congress could reasonably conclude that transfers of machineguns would typically have a commercial or economic component. See *Rybar*, 103 F.3d at 283. Congress could also reasonably conclude that the "extensive, intricate, and definitely national market for machineguns," *Beuckelaere*, 91 F.3d at 784, is an appropriate subject for federal regulation. See *Knutson*, 113 F.3d at 29 ("the vast majority of machinegun possessions constitute the culminating step in interstate commercial transactions"); *Rambo*, 74 F.3d at 952 ("By regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns."); *Wilks*, 58 F.3d at 1521 (Section 922(*o*) "represents Congressional regulation of an item bound up with interstate attributes"). Although the acts prohibited by the statute might occasionally involve purely intrastate activity, Congress has the authority to regulate intrastate conduct when a series of such events, taken in combination, might ultimately have substantial effects on interstate commerce. See, *e.g.*, *Huddleston* v. *United*

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[4] To the contrary, petitioner appears to acknowledge the validity of the transfer ban. See Pet. 12 ("By prohibiting transfer of machineguns, § 922(*o*) aims directly and completely at commercial activity in machineguns.") (internal quotation marks omitted).

States, 415 U.S. 814, 833 (1974); *Perez* v. *United States*, 402 U.S. 146 (1971); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 96-1738, 96-1759

In The
Supreme Court of the United States
October Term, 1996

◆

RAYMOND RYBAR, JR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.
and
WILLIAM J. KIRK,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

◆

On Petitions For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third And Fifth Circuits

◆

CONSOLIDATED BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

◆

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QUESTION PRESENTED

Rybar v. United States:

Section 922(o) of Title 18, United States Code, criminalizes the mere possession of a machinegun, irrespective of any connection to commerce, interstate or otherwise. The question presented is whether, in light of *United States v. Lopez,* 514 U.S. 549 (1995), Congress has such authority under its Commerce Clause power.

Kirk v. United States:

William Joseph Kirk challenged his conviction for possession of a machinegun under 18 U.S.C. § 922(o), contending that by criminalizing mere possession of a machinegun, Congress had exceeded its authority under the Commerce Clause.

The lower court held that the scope of the Commerce Clause was not exceeded. The question presented here is:

Did Congress exceed its authority granted by the Commerce Clause by enacting 18 U.S.C. § 922(o) which prohibits mere possession of a machinegun

Reformulated Question

Whether the Commerce Clause of the United States Constitution, as recently interpreted by this Court in *United States v. Lopez,* 514 U.S. 549 (1995), allows Congress to criminalize the mere intrastate possession of a machinegun.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. Among the missions of NACDL is to ensure justice and due process for such people. NACDL has over nine thousand members nationwide, and is affiliated with sixty-eight state and local criminal defense organizations with over twenty-eight thousand members. NACDL is the only national bar association devoted exclusively to the concerns of those charged with crimes and the attorneys who represent them.

The questions presented in the two above-styled petitions currently pending before this Court raise essentially the same issue: Whether the Commerce Clause power of Congress, as recently interpreted by this Court in *United States v. Lopez,* 514 U.S. 549 (1995), allows the United States to criminalize the mere intrastate possession of a machinegun. The answer to this question will have far-reaching impact upon the administration of criminal justice in each of the fifty states and throughout the federal judicial system. For that reason, NACDL seeks to address the interests of defendants who may not be situated precisely as the petitioners in these cases, but who will be affected by the Court's resolution of this issue. NACDL believes that it is in a unique position to assist the Court in examining the important policy questions raised by this case.[2]

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than *amicus curiae,* made a monetary contribution to the preparation or submission of this brief.

◆

CITATION TO OPINIONS BELOW

The two cases which are currently pending before this Court, and which *Amicus* addresses in a consolidated fashion in this brief, each have lower court opinions which uphold the constitutionality of 18 U.S.C. § 922(o). *United States v. Rybar,* 103 F.3d 273 (3d Cir. 1996); *United States v. Kirk,* 105 F.3d 997 (5th Cir. 1997) (*en banc*). Because the Court of Appeals for the Fifth Circuit evenly split, eight votes to eight, the decision of the original panel was affirmed by operation of law. *United States v. Kirk,* 70 F.3d 791 (5th Cir. 1995).

◆

CONSTITUTIONAL PROVISION

This petition involves the application of Art. 1, § 8, cl.3, the Commerce Clause, of the United States Constitution, which states in relevant part:

> The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

◆

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[2] *Amicus* has obtained consent to the filing of this consolidated brief in support of the grant of a writ of certiorari from all interested parties. These letters of consent have been filed with the Clerk of this Court.

STATUTORY PROVISION

18 U.S.C. § 922(o) provides:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection shall not apply with respect to –
>
> (A) a transfer to or by, or possession under the authority of, the United States or any department or agency thereof or a State or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.[3]

◆

STATEMENT OF THE CASE

Facts and Proceedings in *Rybar v. United States*

Raymond Rybar, Jr., is a United States citizen and a resident of Pennsylvania who was a licensed federal firearms dealer who was authorized to manufacture, sell and transfer machineguns. *United States v. Rybar*, 103 F.3d 273, 275 (3rd Cir. 1996).

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[3] Although this act criminalizes the possession or transfer of such weapons, only the constitutionality of the possession proscription is challenged before this Court.

On April 4, 1992, Mr. Rybar possessed two machineguns as described in the indictment in the District Court. *Id.* These machineguns were not registered with the United States under the National Firearms Act of 1934, 26 U.S.C. § 5801, *et seq. Id.* After Congress enacted 18 U.S.C. § 922(o), it rendered the previous statute, 26 U.S.C. § 5861(e), inapplicable as it pertained to machineguns. *Id.* Therefore, the district court dismissed counts two and four of the indictment which related to "knowingly and unlawfully transferring machineguns" *Id.*

Mr. Rybar was subsequently convicted of two counts of possession of a machinegun in violation of § 922(o). *Id.* at 274. These convictions were the result of a plea agreement between Mr. Rybar and the United States which allowed him to enter a conditional guilty plea preserving his right to appeal the issue of the constitutionality of § 922(o). *Id.* at 275. The United States District Court for the Western District of Pennsylvania entered a judgment of conviction on March 31, 1995. *Id.* at 273. The United States Court of Appeals for the Third Circuit affirmed this conviction in the published opinion *United States v. Rybar*, 103 F.3d 273 (3rd Cir. 1996).

Facts and Proceedings in *Kirk v. United States*

William Joseph Kirk, a resident of Texas, became involved with one Donald James Mueller, an undercover government informant. *United States v. Kirk*, 70 F.3d 791, 792 (5th Cir. 1995). Mueller, over the course of several months, convinced Kirk to sell him two fully automatic weapons, an M-16 and an UZI machinegun. *Id.* at 792. After the delivery of the two guns, which had been home-modified by Kirk from semi-automatic to fully automatic, Kirk was indicted in the United States District Court for the Western District of Texas for two counts of possession of a machinegun and two counts of transfer of a machinegun in violation of Title 18 U.S.C. § 922(o). *Id.* at 792-93. Mr. Kirk entered into a written plea agreement with the Government in which he pleaded guilty to one count of unlawful possession of an unregistered firearm in violation of 18 U.S.C. § 922(o). *Id.* at 792-93. In this agreement, Mr. Kirk specifically reserved his right to appeal the ruling regarding the constitutionality of the statute pursuant to Fed. R. Crim. Proc., Rule 11 (a)(2) *Id.* at 793.

In a published opinion, *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), a panel of the Court of Appeals for the Fifth Circuit affirmed Kirk's conviction holding that the regulation of machineguns was proper under the Commerce Clause. *Id.* Rehearing was granted and after full briefing and argument, the Court of Appeals for the Fifth Circuit, sitting *en banc* issued a published opinion. *United States v. Kirk*, 105 F.3d 997 (5th Cir 1997). The Fifth Circuit, with sixteen judges presiding, equally divided on this issue of the constitutionality of the statute. *Id.* at 998. Therefore, the decision of the panel was affirmed and Mr. Kirk's conviction stood. *Id.*

◆

REASON FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

18 U.S.C. § 922(o) purports to criminalize the mere intrastate possession of a machinegun without reference to that weapon's relationship to interstate commerce. Two

cases currently pending decision on separate petitions for writ of certiorari raise the same issue, namely whether § 922(o) exceeds the acceptable Congressional authority to regulate conduct under Art. 1, § 8, cl.3 of the United States Constitution. *Rybar v. United States*, ___ U.S. ___, No. 96-1738; and *Kirk v. United States*, ___ U.S. ___, No. 96-1759. *Amicus Curiae* supports the granting of the writ in either or both of these cases in order for this Court to address and further develop the jurisprudence of federalism, in particular as it impacts the sovereignty of state and federal powers in the area of criminal law.

In all situations in which there is an application of federal law enforcement power within a State, two separate constitutional principles must be balanced. The first constitutional principle is that criminal law-making and law-enforcement is primarily a matter for the States. However, this first principle must be weighed against a second principle, namely, that Congress has been expressly afforded the power to regulate acts that sufficiently impact a federal interest through Art. I, § 8, cl.3 – the Commerce Clause of the United States Constitution. That is, the bias in favor of State regulation of criminal offenses may be overcome should there be a sufficiently federal, or interstate, interest in the regulation of the conduct in question.

This Court in *United States v. Lopez*, 514 U.S. 549 (1995), clearly delineated those three areas in which Congress may regulate conduct, even with criminal penalties, under the commerce clause. The three areas of appropriate Congressional action are limited to the regulation of 1) the use of the channels of interstate commerce, 2) the instrumentalities of interstate commerce or people and things in interstate commerce, and 3) activities that substantially affect interstate commerce. *See, Lopez,* at 1629. It is only through adherence to these limits on Congressional power that the delicate balance between State and Federal Government interests in law enforcement may be maintained.

In *Rybar* and *Kirk,* the two cases currently before the Court, this balance has been insufficiently and incorrectly analyzed by the courts below. Because the lower courts ultimately allow the federal sovereign to criminalize a wholly intrastate act, without proof or congressional findings of interstate impact, the traditional role of the States as primary sources of criminal law proscription and enforcement has been upset in favor of a plenary police power of Congress. This Court should act now to prevent the usurpation of the traditional State function of criminal law enforcement by the federal government.

I.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE ALLOWS CONGRESS TO CRIMINALIZE THE MERE INTRASTATE POSSESSION OF A MACHINE GUN.

The fundamental dual-sovereign balance:

It is well established that the punishment of crimes is primarily the province of the States. *See, Brecht v. Abrahmson,* 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing criminal law.") In our system of dual or concurrent sovereignty, the States' primacy of interest in criminal justice helps insure that citizens feel close allegiance to their State of residence. Such allegiance is created by just implementation of the laws, both public and private, to the disputes of each State's citizens. Such allegiance assures States remain viable and credible sovereigns in our system of dual powers.

> There is one transcendent advantage belonging to the province of the State governments, . . . I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.

The Federalist Papers, No. XVII. For the federal sovereign to appropriate this power in a haphazard fashion would upset this "most attractive source of popular obedience."

Certainly, the federal sovereign enjoys wide latitude in the regulation of matters which primarily impact federal or interstate concerns. This authority is explicit in the Constitutional grant of authority to Congress through the Commerce Clause. Indeed, such regulation is a critical part of the *raison d'etre* of the federal sovereign. However, actions which are principally *intrastate in effect* may not and should not be regulated by the federal government, particularly through the intrusive power of criminal law enforcement. Where the Constitution mandates an appropriate balance between state and federal jurisdictional powers, expansive Congressional legislation may threaten such balance.

United States v. Lopez:

This careful constitutional balancing act was recently explored by this Court in *United States v. Lopez,* 514 U.S.

549 (1995). In *Lopez,* this Court recognized that the power of Congress to criminalize conduct was broad, but not unlimited:

> [We] have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Id. at 558-59 (citations omitted). Therefore, what this Court accomplished in *Lopez* was not the rewriting – but the righting – of the constitutional balance between sovereigns in criminal law jurisdiction to proscribe.

18 U.S.C. § 922(o):

The statutory provision challenged in this case, is that portion of 18 U.S.C. § 922(o) that prohibits generally the purely intrastate possession of a machinegun.[4] This

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[4] Under § 922(o), a machinegun is defined as

> Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed or intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any

statute is the closest relative of the statute struck down by this Court in *United States v. Lopez,* 514 U.S. 549 (1995). *See, United States v. Rybar,* 103 F.3d 273, 286 (Alto, Cir. J., dissenting). In *Lopez,* this Court struck down 18 U.S.C. § 922(q) because it criminalized, without reference to interstate impact, the possession of all types of firearms in a particular locality – namely near a school yard. Likewise, § 922(o), the statute at issue in this case, criminalizes, without reference to interstate impact, the possession of a certain type of weapon anywhere. Justice Breyer, dissenting in *Lopez* recognized as much when he queried:

> Congress has enacted . . . other statutes that contain no jurisdictional language at all, see, *e.g.,* 18 U.S.C. § 922(o)(1) (possession of machineguns). Do these, or similar statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element?

Lopez, at 630 (Breyer, J. dissenting).[5]

There is no dispute that the statute challenged would satisfy the demands of the Commerce Clause if Congress had added a jurisdictional element which prosecutors

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> combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (1988).

[5] Amicus believes that Rybar's petition for writ of certiorari correctly answers this query: "Yes, § 922(o) plainly purports to regulate a noncommercial activity . . . and, No, that does not alter the plain meaning of "affecting commerce," a jurisdictional element that is plainly absent in the mere intrastate possession of a firearm." *Rybar,* Pet. at 9.

would have to prove before a conviction could be garnered. That element, however, was not made part of the proof necessary for conviction. Likewise, § 922(o) might be sustainable in its current form if Congress had made specific findings that the purely intrastate possession of machineguns has a substantial effect on commerce or if Congress had assembled empirical evidence documenting such a link.[6] Neither of these two facial requisites of constitutionality exist in relation to § 922(o), therefore, the courts must determine whether any of the three '*Lopez* limitations,' previously outlined, necessarily apply to the subject of the statute.

These three categories, described in *Lopez*, in which federal power may be appropriately applied, seem to be distinct and identifiable subsets of a singular power of Congress under the Commerce Clause. The analysis of the lower courts regarding § 922(o), however, suggests that this Court has given insufficient guidance to the federal courts and law enforcement regarding which enactments fall outside the broad scope of Commerce Clause power.

---

[6] The only recorded statement by the sponsor of § 922(o), Representative Hughes, seems to be: "I do not know why anyone would object to the banning of machineguns." 132 Cong.Rec. H1750 (April 10, 1986) (statement of Rep. Hughes). *See, United States v. Kirk*, 70 F.3d 791, 800 (5th Cir. 1995) (Jones, Cir. J. dissenting). Although *Amicus* does not dispute the Representative's statement, nor does *Amicus* doubt the dangerousness of such weapons, it is not the dangerousness of the object but the connection to interstate commerce that is the source of Congressional power.

The Circuit Courts of Appeals:

Although each of the courts of appeals which has considered the constitutionality of § 922(o) has concluded that it satisfies the *Lopez* limitations, there is no consensus regarding exactly why that should be the result. It is the lack of coherent analysis regarding the federal sovereign's power to criminalize conduct which is resulting in the varied, and ultimately incorrect, decisions of these courts. Six courts of appeals have addressed the issue of the impact of this Court's decision in *Lopez* on § 922(o). *United States v. Kirk,* 105 F.3d 997 (5th Cir. 1997) (*en banc*) (evenly split court affirming by operation of law panel decision, *United States v. Kirk,* 70 F.3d 791 (5th Cir. 1995)); *United States v. Rybar,* 103 F.3d 273 (3d Cir. 1996); *United States v. Kenney,* 91 F.3d 884 (7th Cir. 1996); *United States v. Beuckelaere,* 91 F.3d 781 (6th Cir. 1996); *United States v. Rambo,* 74 F.3d 948 (9th Cir. 1996); *United States v. Wilkes,* 58 F.3d 1518 (10th Cir. 1995).

The Fifth, Sixth, and Ninth Circuits have reasoned that § 922(o) was an appropriate exercise of Congressional power as it fit the first '*Lopez* limitation:' regulation of the use of the channels of interstate commerce. *See, Kirk,* 105 F.3d 997, 998 (5th Cir. 1997) (*en banc*) (affirming panel decision, *United States v. Kirk,* 70 F.3d 791, 796 (5th Cir. 1995)); *Beuckelaere,* 91 F.3d 781, 783 (6th Cir. 1996); *Rambo,* 74 F.3d 948, 951-52 (9th Cir. 1996).

Further, the Sixth and Tenth Circuits uphold § 922(o) as an appropriate exercise of Congressional power because it complies with the second '*Lopez* limitation:' regulation of activities that threaten the instrumentalities of interstate commerce or persons or things in interstate commerce. *See, Beuckelaere,* 91 F.3d 781, 784 (6th Cir. 1995); *Wilkes,* 58 F.3d 1518, 1521 (10th Cir. 1995).

Finally, the Third, Sixth and Seventh Circuits have held that § 922(o) withstands constitutional challenge because it meets the third and broadest of the *'Lopez* limitations:' regulation of activities that substantially affect interstate commerce. *See, Rybar,* 103 F.3d 273, 282-283 (3rd Cir. 1996); *Kenney,* 91 F.3d 884, 889 (7th Cir. 1996); *Beuckelaere,* 91 F.3d 781, 786 (6th Cir. 1996).[7]

The wide differences in rationales underlying the lower courts' support of the constitutionality of § 922(o) underscores the need for this Court's intervention. Indeed, if *Lopez* can correctly be distinguished in such a variety of ways in the same circumstance, then *Lopez* has been rendered a legal triviality and has become a decision that has no effect in practice. That is, if the wholly intrastate possession of a machinegun, without Congressional findings or further evidence of intrastate impact, may be criminalized, then Congress has the inherent power to criminalize the possession of any commodity.[8] Put another way, if § 922(o) may indeed be upheld under any and/or all of these rationales, then the lower courts have adopted a theory that "would go far toward converting Congress' authority to regulate commerce into a 'plenary police power.' " *Rybar,* 103 F.3d at 291 (Alito, Cir. J., dissenting) (quoting *Lopez,* 115 S.Ct. at 566).

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[7] It is perhaps most accurate to now add the Fifth Circuit in the list of those Circuits which rely on the third *Lopez* limitation. In a revealing turn of events, a post-*Kirk* panel completely abandoned the analysis of the affirming *en banc* plurality which relied on the first *Lopez* limitation in favor of jurisdiction under the third. *See, United States v. Knutson,* 113 F.3d 27, 30 (5th Cir. 1997).

[8] Circuit Judge Jones perhaps put it best when she stated: "[M]ere intrastate possession of a machinegun is not a use of the channels of interstate commerce any more than mere intrastate possession of a basketball." *United States v. Kirk,* 70 F.3d 791, 799 (5th Cir. 1996) (Jones, Cir. J. dissenting).

In light of the confusion in the lower courts regarding the correct application of the *Lopez* limitations, and in light of the significant effect on the dual sovereign balance such loose interpretations of Congressional power may occasion, it is incumbent upon this Court to grant the writ to clarify the scope – and limits – of Congressional power to proscribe conduct as criminal.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991). Although we enjoy a constitutional system of dual sovereignty, each sovereign power necessarily has limits and legal fences are erected to prevent the trespass of power. Just as states may not declare wars against foreign nations, the federal government may not criminalize and punish acts that have no impact outside the territory of the state. This Court's role as the builder and mender of the fences between state and federal powers is perhaps the most important and unique aspect of our constitutional structure.[9] This role is particularly critical in the area of the power of each sovereign to punish wrongdoing. There is little question that the constitution permits each sovereign to punish the same act independently. *See, Abbate v. United States,* 359 U.S. 187 (1959). However, the important requirements of the double jeopardy bar and simple fairness require that the occasion for such double punishments are rare and only those in which the federal *and* state sovereigns each have an identifiable and individual interest in or effect from the criminal act. The federal punishment of the mere intrastate possession of a machinegun, no matter the nobility of the reason, breaches this necessary divide. As demonstrated above, the breach requires this Court to set the fence back in its constitutionally appropriate line. If this intrusion of federal sovereignty is allowed to stand, then jurisdiction over many similar acts could likewise be usurped by the federal sovereign, subjecting such actors to unfair double punishments.

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[9] Although it is true that "[s]omething there is that doesn't love a wall," in the constitutional context of the powers of the concurrent state and federal sovereigns it is also true that "[g]ood fences make good neighbors." This Court's important role is to aid in the mending once the line is breached, for, what

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CONCLUSION

Amicus Curiae joins petitioners Rybar and Kirk in urging this Court to grant a writ of certiorari – in either case or in both consolidated – in order to correct the failure of the lower courts to adequately limit the power of Congress *vis a vis* the Commerce Clause of the United

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Frost wrote of the gaps in the wall between property is true of the gaps in the thin fence between sovereignty:

> "No one has seen them made or heard them made,
> But at Spring mending-time we find them there."
> – Robert Frost, *Mending Wall.*

States Constitution. Such a grant of this Court's certiorari jurisdiction, and plenary review of the issues presented by these cases, would greatly aid in the administration of criminal justice as well as insure the continued viability of our carefully balanced dual-sovereign system of powers.

Respectfully submitted,

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